(28,695)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1921.**

## No. 740.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, ET AL., APPELLANTS,

*vs.*

W. W. SCHLECHT AND DAVID C. CAYLOR.

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Solicitors for Appellees. [2*]

In the United States District Court for the District of Arizona.

IN EQUITY.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, JOHN A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECT and DAVID C. CAYLOR,

Defendants.

**Amended Complaint.**

Plaintiffs complain and allege:

1. That the plaintiff, Yuma County Water Users' Association, is a corporation duly organized and existing under the laws of the State of Arizona, with its principal place of business at Yuma, Yuma

*Page-number appearing at foot of page of original certified Transcript on Appeal.

County, State of Arizona, with power, among other things, to enter into an agreement with the proper officers of the United States of America with reference to the collection and payment of any and all charges made under the Federal Statutes for the work of providing water for the land of its shareholders and to comply with the provisions of any Federal Statutes applicable to the work by the United States in connection with the system of water supply known as the Yuma Project of the United States Reclamation Service, for certain tracts of land known as the Lower Colorado Irrigation District, which said tracts of land are more particularly described in section 3 of article IV of the Articles of Incorporation of said corporate plaintiff, and in article IV of the amendments to said articles, copies of which are annexed hereto, marked Exhibit "A," and made a part of this complaint: and which said tracts of land are situated in Township 7 South, Range 22 West, Townships 8 South, Ranges 21, 22, 23 and 24 West, Townships 9 South, Range 23 and 24 West, Townships 10 South, Ranges 24 and 25 West, and Townships 11 South, Ranges 24 and 25 West, all in Gila and Salt River Meridian, Yuma County, State of Arizona; and if the defendants are not enjoined and restrained from the perpetration of the wrongful and unlawful acts hereinafter complained of, the said plaintiff corporation will be damaged to the [3] extent of and in the sum of three million five hundred thousand dollars.

2. That the plaintiff Theilmann is a resident

citizen of Yuma County, State of Arizona, one of the shareholders of said plaintiff corporation and the owner of a tract of land, to wit: S. E. ¼ of Section 8, Township 10 South, Range 24 West, the same being a part of said Lower Colorado River Irrigation District; and, if the defendants are not enjoined and restrained from the perpetration of the wrongful and unlawful acts hereinafter complained of, the said plaintiff will be damaged to the extent and in the sum of $6,000.00: and the said plaintiff Theilmann sues herein on his own behalf and for and on behalf of a class of persons similarly situated to him, who are so numerous as to make it impractical to bring them all before this Court, each of whom will be damaged, if the said wrongful acts are not restrained, in a sum of money in excess of $3,000.00.

3. That the plaintiff Donovan is a resident citizen of Yuma County, State of Arizona, one of the shareholders of said plaintiff corporation and the owner of two tracts of land within said Lower Colorado Irrigation District: and if the defendants are not enjoined and restrained from the perpetration of the wrongful and unlawful acts hereinafter complained of, the said plaintiff will be damaged to the extent and in the sum of $3,200.00, and the said plaintiff Donovan sues herein on his own behalf and for and on behalf of a class of persons similarly situated to him, who are so numerous as to make it impractical to bring them all before this Court, each of whom will be damaged, if the said wrongful acts are not restrained, in a sum of money in excess of $3,000.00.

4. That the plaintiff Thurman is a resident citizen of Yuma County, State of Arizona, and one of the shareholders of said plaintiff corporation, and the owner of a tract of land within said Lower Colorado River Irrigation District; and if the defendants are not enjoined and restrained from the perpetration of the wrongful and unlawful acts hereinafter complained of, the said [4] plaintiff will be damaged to the extent and in the sum of $3,200.00: and the said plaintiff Thurman sues herein on his own behalf and for and on behalf of a class of persons similarly situated to him, who are so numerous as to make it impractical to bring them all before this Court, each of whom will be damaged, if the said wrongful acts are not restrained, in a sum of money in excess of $3,000.00.

4½. That the plaintiff Archie J. Griffin is a resident citizen of Yuma County, State of Arizona, one of the shareholders of said plaintiff corporation and the owner of two tracts of land within said Lower Colorado Irrigation District: and if the defendants are not enjoined and restrained from the perpetration of the wrongful and unlawful acts hereinafter complained of, the said plaintiff will be damaged to the extent and in the sum of $3,200.00, and the said plaintiff Griffin sues herein on his own behalf and for and on behalf of a class of persons similarly situated to him, who are so numerous as to make it impractical to bring them all before this Court, each of whom will be damaged, if the said wrongful acts are not restrained, in a sum of money in excess of $3,000.00.

5. That all of said plaintiffs have an interest in the subject of this suit and in obtaining the relief herein demanded and are, therefore, joined as plaintiffs herein.

6. That the residence and citizenship of the defendant W. W. Schlect is not known to the plaintiffs but said defendant is now domiciled in Yuma County, State of Arizona; that the defendant David C. Caylor is a resident citizen of Yuma County, State of Arizona; and both of said defendants are claiming to act as officers of the Reclamation Service of the United States.

7. That this suit arises under the laws of the United States of America, and involves the construction thereof, and that the amount or value of the matter in dispute exceeds the sum of $3,000.00, exclusive of interest and costs; and that the amount or value of the matter in dispute between each of the plaintiffs and the defendants herein exceeds the sum of $3,000.00, exclusive of [5] interest and costs.

8. That said Lower Colorado Irrigation District, as will more fully appear from the map or plat thereof, which is annexed hereto and marked Exhibit "B," is divided by natural boundaries into three separate tracts, which shall hereinafter be referred to as Tracts A, B and C; said Tract A being the lands situated within said Irrigation District lying north of the Gila River and east of the Colorado River, and commonly known as the North Gila lands; tract B being the lands in said District lying south of the Gila River, east of the City of Yuma

and north of the edge of the Mesa, and commonly known as the South Gila lands; tract C being the lands in said district lying south and west of the City of Yuma, west of the edge of the Mesa, and east of the Colorado River, and commonly known as the Yuma Valley lands, now designated by the United States Reclamation Service as the Second Unit of the Yuma Project; that on June 17, 1902, when the Act of Congress of that date (32 Stat., 388), commonly known and hereinafter referred to as the Reclamation Act, was approved, all of the lands in said Irrigation District were in private ownership except a few one-hundred-and-sixty-acre (or less) tracts in Tracts A and B, and two forty-acre tracts in said Tract C.

9. That in the fall of the year 1902 the Secretary of the Interior of the United States of America, under and by virtue of the provisions of said Reclamation Act, caused to be made examinations and surveys of said Irrigation District, and all lands therein including said Tracts A and B, and the Colorado River, with the object and purpose, if the same should be by him deemed practical, and advisable to locate and construct irrigation works for the diversion and development of the waters of said River for the irrigation and reclamation of all the lands within said Irrigation District, including said Tracts A and B; and did, in the Summer and Fall of said year 1902, withdraw from public entry all lands upon the Colorado River required for the constructon of a weir dam across said Colorado River, for the purpose of developing irrigation

water from said River for the irrigation of all of said [6] lands, including the lands in said Tracts A and B, and, prior to the making of said examinations and surveys, withdraw all public lands in said Irrigation District, including said Tracts A and B from entry, except under the Homestead Laws; and said examinations and surveys were prosecuted diligently to completion.

10. That thereafter, on May 10th, 1904, the Secretary of the Interior, acting under the provisions of said Reclamation Act, and being fully advised in the premises from the examinations and surveys which he had made, and had caused to be made, as aforesaid, which, together with the necessary maps, plans and estimates of cost therefor, were then completed, and had been submitted for his consideration, determined that the irrigation and reclamation of said Irrigation District, and all the lands therein, including all the lands in said Tracts A and B, were practical and advisable under the provisions of said Reclamation Act, whereupon the said Secretary of the Interior, the necessary funds therefor being available in the funds created by said Reclamation Act, caused contracts for the construction, as part of said Project, of said weir dam across the Colorado River, named by him and commonly known as the Laguna Dam, to be let, and caused contracts to be let for the construction, as part of said Project, of certain levees along the banks of the Gila and Colorado Rivers for the purpose of protecting the lands adjacent thereto and within said Irrigation District from overflow from

said Rivers, and did thereupon, on said May 10th, 1904, determine and estimate the cost of the construction of said Project, then designated by said Secretary of the Interior, and hereinafter referred to, as the Yuma Project, and did thereupon determine and estimate, and give public notice of, the charges which should be made per acre upon all lands within said Irrigation District and Yuma Project to be irrigated by the waters to be developed thereby, for the cost of the construction of said Project, exclusive of the cost of operation and maintenance, to wit, the sum of $35.28, which said charges were determined by said Secretary with the view of returning to the [7] fund created by said Reclamation Act the said estimated cost of said Project, and said estimate of $35.28 was equitable and equitably apportioned over and upon all the lands in said Irrigation District, including all the lands in said Tracts A and B; and, the said Secretary did thereupon set aside a sufficient sum of money, to wit, the sum of $3,000,000, from the funds furnished by said Reclamation Act for the construction of said Yuma Project under the provisions of said Reclamation Act; and did give public notice of the lands irrigable under said Yuma Project, to wit, all the lands in said Irrigation District, including all the lands in said Tracts A and B, as well as of the number of annual installments, to wit, ten, within which said charges should be paid, and the time when such payments should commence, to wit, on the completion of said Project.

11. That during the time that said examinations and surveys were being made by the Secretary of the Interior the plaintiff corporation was organized, at the suggestion and under the direction of said Secretary of the Interior, by the owners of land in private ownership within said Irrigation District, with the purpose and object, among other things, of dealing and negotiating with the Secretary of the Interior, under the provisions of said Reclamation Act, to secure the aid of the United States in the construction of said Irrigation Project, and for the collection and payment to the government of the United States of all moneys which might be due the government for the use of water from any irrigation works acquired or constructed by said government under the provisions of the said Reclamation Act, under a plan which was approved by said Secretary, and prescribed by the Articles of Incorporation of said corporate plaintiff, whereby the shareholders of said corporate plaintiff, all of whom were required to be landowners within said Irrigation District, pledged and mortgaged their respective tracts of land as security for the payment of the estimated costs and charges of any irrigation project which might be acquired or constructed by the government of the United States under the provisions [8] of said Reclamation Act; for the irrigation of all the lands in said Irrigation District, including said Tracts A and B, and the necessary act on the part of any person or landowner required by said Articles of Incorporation as a condition precedent to his becoming a shareholder in said cor-

poration plaintiff had the legal effect, *ipso facto,* of pledging and mortgaging his tract of land as security for the payment of said costs and charges.

12. That on May 10th, 1904, at the time of making of said estimate of the cost of said Yuma Project, by the Secretary of the Interior, there were in active operation for the supply of water to lands within said Tract C, commonly known as the Yuma Valley lands of said Irrigation District, three separate and distinct irrigation projects or canal systems operated by three separate corporations, as common carriers and public agents for the conveyance of irrigating water, whereby large portions of the lands in said Tract C were actually being served with irrigation water therefrom for their reclamation and cultivation; the source of the supply thereof being the Colorado River, the waters of which had been appropriated to such use.

13. That thereafter, and on or about May 28th, 1907, in good faith believing in, and relying upon, the said estimate of cost per acre, to wit, the sum of $35.28, so made and public noticed by the Secretary of the Interior as aforesaid, and believing in and relying upon the promises and representations of one F. H. Newell, Chief Engineer of the United States Geological Survey, now the United States Reclamation Service, and one J. B. Lippincott, Supervising Engineer of said Geological Survey, now the United States Reclamation Service, both of whom were thereunto duly authorized by the Secretary of the Interior, acting for and on behalf of the United States of America, under the provisions of

the said Reclamation Act, that the said Yuma Project could be and would be completed at said estimated cost of $35.28 per acre and within two years from the commencement of the work thereupon, which said promises and representations were made by said chief engineer and said supervising [9] engineer at Yuma, Arizona, on May 28th, 1904, at that time being duly authorized thereunto by said Secretary of the Interior, as aforesaid, and induced thereby and in consideration thereof, the owners and occupants of practically all of the lands within said Irrigation District, with the exception of not to exceed two thousand acres thereof, became shareholders of the plaintiff corporation and thereby pledged and mortgaged their respective tracts of land to secure the payment of said estimated cost, to wit, the sum of $35.28 per acre, to the government of the United States, under the provisions of said Reclamation Act, but that if said owners and occupants had known or believed, or could have foreseen, that the cost per acre of the said Yuma Project, and the cost to be placed upon their lands for the construction of said Project could have or would have exceeded the sum of $35.28 per acre, they would not have so pledged their said lands to secure the payment of said estimated cost, or any part thereof.

14. That the plaintiff Theilmann was present in Yuma, Arizona, on said May 28th, 1904, he being then the owner of said S. E. ¼ of Section 28, and being fully advised by said public notice so made by the Secretary of the Interior as aforesaid that the

estimated cost of the construction of said Yuma Project for the reclamation of lands within said Irrigation District, including said lands of said plaintiff Theilmann, and hearing, and in good faith believing, the said representations and promises so made by the chief engineer and said supervising engineer, as aforesaid, said plaintiff Theilmann, relying thereon, induced thereby, and in consideration thereof, became a shareholder in said plaintiff corporation, and thereby pledged and mortgaged his said lands to secure the payment of said estimated costs and charges and the said plaintiff Theilmann, unless he had believed in, and relied upon, the said estimate of $35.28 so made and public noticed by the Secretary of the Interior, as aforesaid, and unless he had believed in, and relied upon, the said promises and representations so made by the said chief engineer and said supervising engineer, would not have become a shareholder in [10] said corporation plaintiff and would not have pledged or mortgaged his said lands to secure the payment of said estimated cost, or any other sums of money whatsoever. That said plaintiff Theilmann had then a water right in an irrigating canal company, then a going concern, whereby he was receiving, and could have continued to receive, an ample and sufficient supply of water for the continuous irrigation of his said tract of land, and had the plaintiff Theilmann believed, and could he have foreseen that the cost per acre of the said Yuma Project, and the cost to be placed upon his said lands for the construction of said Project could have, or would

have, exceeded the sum of $35.28 per acre, in any sum or sums whatsoever, he would not have so pledged or mortgaged his lands to secure the payment of said estimated cost, or any part thereof, nor would any other landowners and occupants of land within said irrigation District, consisting of may hundreds of persons, have pledged or mortgaged their, or any of their, respective tracts of land to secure the payment of said estimated cost of $35.28 per acre, which said class of persons being too numerous to be brought before this Court are represented herein by said plaintiff Theilmann.

15. The said determination by said Secretary of the Interior and the said promises and representations as made by said engineers, as aforesaid, induced said landowners and occupants to so pledge and mortgage their said lands to secure the payment of said estimated cost; but had said landowners and occupants believes, or could they have foreseen, that said project would not be constructed as a whole and at a cost per acre equal throughout all of said Irrigation District, they would not have so pledged and mortgaged their said lands to secure the payment of said estimated cost or any part thereof.

16. That said Secretary of the Interior, from said examinations and surveys so made, and caused to be made, by him, as aforesaid, determined that the construction of said Yuma Project for the irrigation and reclamation of all the lands in said Irrigation District, including all the lands in said Tracts A and B, was practicable [11] and advis-

able as a whole, including a system of levees and ditches for all thereof, and a drainage system for the entire project, including Tract C; and the said chief engineer and the said supervising engineer, thereunto duly authorized by the said Secretary of the Interior, on said 28th day of May, 1904, promised and represented to the plaintiff corporation and the said owners and occupants of the land within said Irrigation District, that said Project could be, and would be, constructed as a whole, including the reclamation of all the lands in said Tracts A and B, with said levee, ditch and drainage system, at a cost per acre of $35.28 to be equal throughout all of said Irrigation District; and that all of said Tracts A, B and C of said Irrigation District could and would receive water for their reclamation and irrigation at the same time.

17. That thereafter and on May 31, 1906, the United States of America, acting by and through its Secretary of the Interior, entered into an agreement with the plaintiff corporation, acting for and on behalf of its shareholders, and all its shareholders to be, and acting for and on behalf of all the other plaintiffs herein, under the provisions of the Reclamation Act, a copy of which said agreement is annexed hereto, marked Exhibit "C," and made a part of this complaint, whereby it was agreed and determined that the estimated cost of said Yuma Project for the irrigation and reclamation of the lands within said Irrigation District should be divided into not less than ten annual payments, the first whereof to be payable at the time of the com-

pletion of said Project, or within a reasonable time thereafter, and not before; and that the cost per acre should be equal; throughout all of said irrigation District; and whereby the plaintiff corporation agreed that it would promptly collect and require prompt payment from its shareholders of the cost of said Project, and it did thereby guarantee the payment of said cost.

17½. That the plaintiff corporation has in all things duly performed, on its part, all the conditions of said contract, required by its terms to be performed, at this time: that all of the [12] lands within said irrigatioin district, including all of the lands in said Tracts A and B, is capable of being irrigated by the waters of the Colorado River; and there is an ample and sufficient supply of water available, and flowing unused, in said Colorado River, and which has been appropriated to the beneficial use of all of said lands, to amply and perpetually irrigate all of said lands, including all of the lands in said Tracts A and B: which said waters, so available for all of said lands as aforesaid, was duly appropriated, in accordance with the provisions of the said Reclamation Act of June 17, 1902, by the Secretary of the Interior on August 20, 1903, which will more fully appear by the record of said appropriation recorded in Book 4 of Miscellaneous Records, page 439, in the office of the County Recorder of Yuma County, State of Arizona, where all of said lands are situate; and by an amended appropriation thereof on July 8, 1905, as will more fully appear by the record

thereof, in Book 5 of Miscellaneous, page 99, in the office of said County Recorder.

18. That notwithstanding the said estimate and determination of the Secretary of the Interior, and notwithstanding the said representations and promises of the said Engineers, and notwithstanding the tenor and effect of said agreement on May 31, 1906, the said Yuma Project has not been completed as a whole, or at all, and that large portions thereof have not been completed as so determined by the Secretary and as promised by said Engineers; i. e., no portion of said Tract A, although there is water available therefor, as aforesaid, has been reclaimed by means of said Project, or at all, except a small portion thereof which is receiving irrigating water from a certain gravity canal constructed by the Secretary of the Interior, in accordance with his said estimate, determination, public notice, and said contract, along a portion of the east side thereof, said irrigated lands being a very small fraction of the whole of said Tract A; and that no levees whatsoever have been built for the protection of the lands within said Tract A, on either the Gila or the Colorado sides, thereof, except small portions of the northern and southern ends of said Tract A; [13] and no portion of said Tract B of said Project and District, although there is water available therefor, as aforesaid, has been reclaimed or irrigated in any way or manner whatsoever by means of said Project, and no ditches, levees or drainage system whatsoever has been constructed thereon or therefor, except about five miles of levee constructed by the Secretary of

the Interior in accordance with his said estimate determination, and public notice, and said contract, in the year 1906, along the south bank of the Gila River in the eastern portion of said Tract B, and the whole of said Tract B, consisting of about 11,000 acres, has been left in the desert condition in which it was in the year 1904, when the Secretary of the Interior made such determination and estimate as aforesaid, and when the said Engineers made the promises and representations aforesaid; and no drainage system whatsoever has been constructed for that portion of said project and District, designated hereon as Tract C, except about three miles of a drainage ditch in the extreme southern portion of said Tract C; although a drainage system for all of the lands in said Tract C is necessary for the reclamation of said lands, and to preserve the same from being rendered utterly worthless by the accumulation therein of deleterious, soluble salts from the surplus waters underlying the same: and said drainage system cannot be, as plaintiffs are informed and believe, constructed within a shorter period of time than two and one-half years from this date; and although said drainage system for said Tract C is now in process of construction by the Secretary of the Interior, in accordance with his said estimate, determination and public notice, and said contract, and is being diligently prosecuted; and a substantial portion, to wit, 44 per centum, of said Project remains uncompleted.

19. That work was begun upon said Project, under the provisions of said Reclamation Act for the irrigation of the lands within said Irrigation District, in

the summer of the year 1905, but, notwithstanding the promises and representations of said engineers, and notwithstanding the fact that a contract was let [14] for the construction of said Laguna Dam across the Colorado River to one J. G. White & Company, a corporation, which, under the penalty of a bond in a large sum of money, to wit, the sum of $160,000.00, as plaintiffs are informed and believe, covenanted and agreed to construct said weir dam within two years from the commencement thereof, and which said work was begun by said contracting corporation on or about the first day of August, 1905, the said work was not completed within two years, as promised and represented by said engineers, and as contracted for as aforesaid; and on or about the first of February, 1908, through the fault and neglect of the Secretary of the Interior, and the director and chief engineer of said Reclamation Service (they having prior to said last-mentioned date released the said contracting corporation from the obligation of its said covenants and agreement, and the penalty of said bond), the work was not completed, and there was, as then stated and represented by said director and chief engineer, no probability that said work would be completed within any reasonable time in the future, and as then further stated and represented by said director and said chief engineer, it was impossible to determine with any reasonable degree of certainty when said work could be or would be completed; and owing to the fact of the United States having begun the construction of said Yuma Project, as aforesaid, the aforementioned

common carriers and public agent corporations operating said canals and serving water to lands in said Tract C, as set forth in Paragraph 12 hereof, were, because of the threatened competition of the United States by means of the said Yuma Project, practically put out of said business, operation and service, and were no longer able to furnish a sufficient supply of irrigating water to said lands, and said lands were threatened with a scarcity of water, and being thereby reduced to their original desert condition, and the security of the United States for the payment of the estimated cost of said Yuma Project thereby greatly depreciated, if not entirely destroyed; whereupon, and in consideration [15] thereof, the United States of America, acting through said Secretary of the Interior and said director and chief engineer of the Reclamation Service, purchased and acquired, and took over the management and control of, two of the said irrigating canal systems operated by said common carriers and public agents in conveying and furnishing water to the lands of said Tract C of said irrigation District, and proceeded to operate the same as a common carrier of irrigating water and a public agent as the carrier of water from the Colorado River to the lands within said Tract C; and the United States of America, acting through its said Secretary of the Interior and the officers and employees of said Reclamation Service, continuously operated said irrigating canals as such common carrier and public agent, as aforesaid, until on or about June 1st, 1912, when the said Reclamation

Service had in part completed the said Project for the lands embraced within said Tract C, and had constructed thereon and thereover many miles of main and lateral canals (portions thereof being constructed upon and over rights of way which it had acquired from the purchase of said irrigating canals in the year 1906 as aforesaid), and since said June 1st, 1912, the United States of America, acting through its Secretary of the Interior and said director and chief engineer, has continuously down to the present time operated said last-mentioned canals as a common carrier and public agent for the conveyance and distribution of irrigating waters to all the lands within said Tract C; and the United States promised, agreed and undertook, and became, by operation of law, obligated to operate said canals and to supply water therefrom to said lands until the Yuma Project should be fully completed.

20. That all of the lands within said Yuma Project and said irrigation District, including the lands belonging to the plaintiffs Theilmann, Donovan, Thurman and Griffin are highly productive if furnished with an ample supply of irrigating water, but without such irrigating water the lands are entirely worthless. That the lands of the plaintiffs Theilmann and Donovan and the lands of the classes of persons for whom they sue herein, to the [16] extent of at least 35,000 acres, have, by means of water supplied by said canal systems, been brought to a high state of cultivation and have now growing thereon valuable crops of cotton and per-

manent crops of alfalfa of the value, in the aggregate, of at least the sum of $3,000,000, all of which would be utterly ruined and destroyed and said lands reduced to their original barren and desert condition if the defendants should be permitted to commit the unlawful and wrongful acts herein complained of, and unless the defendants are restrained from the perpetration of the said wrongful and unlawful acts.

21. That at the time of the purchase and acquisition of said irrigating canals in the year 1908, as aforesaid, the United States of America, acting through its Secretary of the Interior and said director and chief engineer of said Reclamation Service, promised and agreed and undertook to continue to furnish water to all of the lands within said Tract C until such time as the said Yuma Project should be fully completed as originally determined by said Secretary of the Interior, and promised and represented by said chief engineer and said supervising engineer in the month of May, 1904; and all of the lands within said Tract C had in the year 1908, and now have, appurtenant water rights in the waters of the Colorado River, and the owners and occupants of said land then had, and now have, vested rights in the use of said waters upon their respective tracts of land; and without the use of said waters all of said land within said Tract C are utterly unproductive and valueless, but, as aforesaid, with the use and application of said waters the said lands are highly productive and very valuable.

22. That the defendants W. W. Schlecht and David C. Caylor, claiming to act as officers and employees of said Reclamation Service, have and are exercising control and management of said canal system for said Tract C; and have exercised such control for a long time prior to the commencement of this suit.

23. That notwithstanding said determination and estimate of cost of the sum of $35.28 per acre, so made by the Secretary of [17] the Interior on May 10th, 1904, as aforesaid, and notwithstanding the promises and representations of the said chief engineer and the said supervising engineer, and notwithstanding the said fact that said Yuma Project has not been completed and is uncompleted to the extent of forty-four per centum thereof, as aforesaid, and notwithstanding the promises and agreements of the said Secretary of the Interior and the said director and chief engineer of the Reclamation Service, to furnish water for all the lands of said Tract C until said Project should be fully completed, the said defendants, with the unlawful purpose and intent of compelling the plaintiffs Theilmann, Donovan, and Thurman and all the shareholders of the plaintiff corporation owning lands within said Tract C to execute and deliver to the officers of said Reclamation Service an unconscionable and inequitable contract whereby each and all of said shareholders will, according to the tenor and effect thereof, among other things, promise and agree to pay into the Reclamation Fund for the cost and expense of said Yuma Project ex-

clusive of the cost of operation and maintenance, a sum of money greatly in excess of said estimated cost of $35.28 per acre, to wit, the sum of $75.00 per acre, and unless they forthwith, not later than December 31, 1917, begin to pay said wrongful and inequitable charge, thereby contriving and designing to injure the plaintiff corporation and the other plaintiffs and all for whom they sue herein, threaten to and will, unless restrained by order of this Court, wrongfully and unlawfully, and without warrant of law, shut off the supply of water from the lands of the plaintiffs Theilmann, Donovan, Thurman, and from the lands of all those for whom they sue herein, and herefor; and now threaten to continue to refuse any water whatsoever to said lands, and to prevent the diversion thereof to any of said lands, or any part thereof, unless the plaintiffs Robert H. Theilmann, John A. Donovan, and Ralph Thurman, and all persons for whom they sue herein, execute and deliver to them such unconscionable and inequitable contract, and thereupon commence to pay such wrongful, unlawful, and inequitable charge of $75.00 per acre, whereby plaintiffs will be greatly and irreparably injured. [18]

23 A. That notwithstanding the terms of said contract of May 31, 1906, copy of which is annexed hereto as Exhibit "C," and notwithstanding that the said drainage system for the lands embraced in said Tract C has not been completed, and cannot be completed prior to two and one-half years from the filing of this complaint, all as aforesaid, the officials of the U. S. Reclamation have computed and estimated the cost

of said drainage system at about the sum of $750,000.00, as plaintiffs are informed and believe; and the said sum of $75.00 per acre, for the payment of which the defendants, unless restrained by this Court, will unlawfully compel the plaintiffs Theilmann, Donovan and Thurman, and all the stockholders and constituent members of the plaintiff corporation who own lands within said Tract C to execute and deliver to said defendants an unconscionable and inequitable contract as aforesaid, consists, with other items and estimates, of the sum of $15.00 per acre for each and every acre of irrigable land within said Tract C; whereby the said plaintiffs will be compelled, if the defendants are not restrained by this Court, to agree to pay, and to commence the payment, for said drainage system more than two years in advance of the construction and completion thereof, to plaintiffs' irreparable damage and injury.

23 B. That the said contract which the defendants are unlawfully attempting to compel the plaintiffs Theilmann, Donovan and Thurman, and the other stockholders of the plaintiff corporation who own lands in said Tract C, to execute and deliver to them, the said defendants, (a copy of which, except as to unfilled blanks therein, is annexed hereto, marked Exhibit "D," and made part of this paragraph) is inequitable and unconscionable in this:

a. By its terms each signer thereof will agree to pay the sum of $75.00 per acre for each acre of irrigable land situated within said Tract C as a construction charge for said Yuma Project, notwithstanding the said estimates, determination and public notice of

the Secretary of the Interior so made in the year 1904, as aforesaid; and agrees to commence the payment of such charge of $75.00 per acre on or before December 31, 1917, notwithstanding the terms [19] and conditions of said contract of May 31, 1906, and notwithstanding, as plaintiffs now allege, that the irrigable lands in said Tract C, cannot, nor the owners thereof, afford to pay such charge, the same being more than said lands, one year with another taken over the period of time provided for the payment of the annual installments of the construction charge of said Project, according to the terms of said contract of May 31, 1906, to wit: ten years; and said charge of $75.00 per acre is, and will be during all of said period of ten years, an unjust and inequitable burden upon said lands and their owners; and said charge of $75.00 per acre on said lands in said Tract C is, and will be, excessive, and unjust and grossly exorbitant, and out of all proportion to, and greatly in excess of, the actual value of the works constructed, and to be constructed, in said Yuma Project for the irrigation and reclamation of said lands; and, as will hereinafter more fully appear, the said charge is not equal throughout the said Irrigation District, in violation of the terms of said contract of May 31, 1906.

b. That by its terms the signer thereof shall be, in violation of Constitution of the United States, and the Constitution of the State of Arizona, compelled to, and he shall, if he executes the same waive all right to compensation for his property taken, or to be taken, for public purposes; and shall be compelled to, and he shall, if he executes the same, grant to the

United States without consideration or compensation therefor, all of his property heretofore taken, or to be hereafter taken, for public use in connection with said Yuma Project; all of which will more fully appear by section 8 of said Exhibit "D" annexed hereto.

c. By its terms the signer thereof is compelled to agree to pay the sum of $1.50 per acre, per annum, for each acre of the land owned by him within said Tract C as a minimum operation and maintenance charge in connection with said Project, whether water is used thereon or not; which said minimum charge is, and will be, inequitable, unjust and illegal, and arbitrary, excessive and unreasonable; and greatly in excess of the reasonable cost of the operation and maintenance of said Project. [20]

24. That the ability of the plaintiff corporation to meet its obligations depends almost entirely upon the ability of its shareholders to meet and pay to said plaintiff corporation the dues, charges and assessments levied, and to be levied, under the provisions of the Articles of Incorporation of the plaintiff corporation, upon the lands of its shareholders; and if the wrongful and unlawful acts of the defendants are not restrained by order of this Court the lands of the shareholders of the plaintiff corporation will be rendered barren and desert and thereby become valueless, and it will be impossible for the shareholders of the plaintiff corporation to pay to it their said dues and assessments; or in the event of said shareholders being compelled to execute and deliver to said defendants the said

unconscionable and inequitable contract, the obligations of the plaintiff corporation, under the provisions of the agreement of May 31, 1906, a copy of which is annexed hereto as plaintiffs' Exhibit "C," whereby the plaintiff corporation guaranteed the payment of the estimated costs of the construction of said Project would be increased in the sum of at least $3,500,000, to the plaintiff corporation's great and irreparable damage.

25. That the plaintiff Theilmann is the owner of the SE. ¼ of Sec. 8, Township 10 S., Range 24 W., G. and S. R. Mer., and situated within said Irrigation District as aforesaid. That he is now growing thereon a valuable crop of cotton, and intends, in good faith, if not wrongfully deprived of water therefor, to grow a valuable crop of cotton thereon during the season of 1918, and to which an ample supply of irrigating water is indispensable, and that without it said crops will be ruined and become an entire loss, and said land will return to its original waste and desert condition; that unless the plaintiff executes and delivers to the defendant an unconscionable and inequitable contract, more particularly described in Par. 23 B hereof, whereby, according to its tenor and effect, he shall promise and agree to pay as the cost and charges of the construction of said Yuma Project, exclusive of the cost of operation and maintenance, a sum of money greatly in excess of said estimated [21] cost of $35.28 per acre, to wit, the sum of $75.00 per acre for each and every acre of said SE. ¼ of Sec. 8, and whereby he shall promise and agree to

waive the rights, and to perform the inequitable things more fully set forth in Par. 23 B hereof, the said defendants will, if not restrained by order of this Court, shut off the said plaintiff's supply of water for said SE. ¼ of said Sec. 8, and will continue to refuse to supply any water whatsoever to said land and prevent the diversion thereof to said land, or any part thereof, unless the said plaintiff execute and deliver said unconscionable and inequitable contract and thereupon commence to pay said wrongful and unlawful charge of $75.00 per acre, whereby plaintiff will be greatly and irreparably injured in the sum of $6,000.00; and the said defendants will, if not restrained by order of this Court, shut off the supply of water from the lands of all the persons for whom the plaintiff Theilmann sues herein, unless they, and each of them, execute and deliver a like unconscionable and inequitable contract whereby, according to its tenor and effect, they, and each of them, shall promise and agree to pay said inequitable and wrongful charge of $75.00 per acre, and unless they thereupon begin the payment of such charges, and unless they, and each of them, shall promise and agree to waive the rights and perform the inequitable things more fully set forth in Par. 23 B hereof, all to their, and each of their, great and irreparable injury.

26. That the plaintiff Donovan is the owner of an undivided one-half of the S. ½ S. ½ of Section 12, Township 9 South, Range 24 West, Gila and Salt River Meridian, and situated within said Tract C; and is also the owner of the S. ½ NE. ¼

of Section 29, Township 8 South, Range 22 West, G. and S. R. Mer., within the limits of said Tract B, and all within said Irrigation District and Yuma Project. That as to the said S. ½ S. ½ of said Section 12, in said Tract C, the plaintiff Donovan is the successor in interest of one Thomas Lyall, who in the year 1904 was the owner of said S. ½ S. ½ of said Section 12, and who, believing in and relying upon the said determination and estimate of cost made by the Secretary of the Interior as aforesaid, and believing in and relying upon the [22] promises and representations of said Chief Engineer and said Supervising Engineer, so made as aforesaid on May 28th, 1904, and induced thereby, did become a shareholder in said Plaintiff corporation and did thereby pledge and mortgage said tract of land to secure the payment of said estimated cost of the sum of $35.28 per acre, and the said plaintiff Donovan, also relying upon said estimate so made and said promises and representations did thereafter purchase and acquire said undivided one-half of said S. ½ S. ½ of said Section 12, and if the plaintiff Donovan had believed, or could have foreseen, that any greater sum of money than $35.28 per acre would be charged, or be attempted to be collected for the cost and expense of said Yuma Project, or if he had believed or foreseen that any charge whatsoever would be made, or be attempted to be made or collected from plaintiff Donovan, on said last-mentioned tract of land at any time prior to the completion of said Yuma Project, he would not have purchased or acquired

said last-mentioned tract of land; that as to said S. ½ NE. ¼ of said Section 29 in said Tract C, the plaintiff Donovan is the owner successor in interest of one, Concepcion Armenta who, in the year 1904 was the owner of said S. ½ NE. ¼ of said Section 29, and who believing in and relying upon the said determination and estimate and said promises and representations and particularly upon the determination of the Secretary of the Interior that said Project would be completed as a whole, and the promises and representations of said chief engineer and said supervising engineer that said Project could be and would be completed within two years from the time of the commencement of work thereon became a shareholder in the plaintiff corporation, and thereby pledged and mortgaged said tract of land to secure the payment of the estimated cost of said Project; and the plaintiff Donovan believing in and relying upon the said determination and estimate of cost and said representations and promises and particularly relying upon the covenants of said agreement, a copy of which is annexed hereto, marked Exhibit "C," that the cost of said Project should be divided into not less than ten annual payments, the first whereof should [23] be payable at the completion of said work and that the cost per acre should be equal throughout the whole of said Irrigation District, did thereafter purchase and acquire said tract of land, but the said plaintiff would not have purchased and acquired said tract of land had he believed or foreseen that said determination and es-

timate of cost so made by the Secretary of the Interior, and said promises and representations, and the covenants of said agreement, would not be put into effect, kept and consummated; and that notwithstanding the said determination and estimate of cost and said representations and promises, and the covenants of said agreement have not been put into effect, kept or consummated, the defendants, wrongfully and unlawfully, and without warrant of law, will, if not restrained by order of this Court, shut off the plaintiff Donovan's supply of water from his undivided one-half of S. ½ S. ½ of said Section 12 in said Tract C, unless said plaintiff Donovan execute and deliver to them an unconscionable and inequitable contract more fully described in Par. 23 B hereof, whereby said plaintiff Donovan will promise and agree to pay as the cost and charges of the construction of said Yuma Project, exclusive of the cost of operation and maintenance, the sum of $75.00 per acre, for each acre of said undivided one-half of the S. ½ S. ½ of said Section 12, and whereby he will waive the rights, and agree to perform the inequitable things more particularly set forth in Par. 23 B hereof, and unless he shall proceed thereupon to make payment for the cost and charges of the construction of said Project at said rate of $75.00 per acre, and now threaten to continue to refuse to supply any water whatsoever to said last-mentioned tract of land and to prevent the diversion thereof to said tract of land or to any part thereof unless the plaintiff Donovan shall forthwith, on or before Dec.

31, 1917, commence payment of said unconscionable and inequitable charge of $75.00 per acre, thereby threatening to render said tract of land entirely worthless and reduce it to its original desert condition, all to plaintiff Donovan's great and irreparable injury. That the plaintiff Donovan sues herein for a class of persons, too numerous [24] to be brought before this Court, who each own lands in said Tract B and C and who are threatened with irreparable injury by the defendants, in like manner as the plaintiff Donovan, unless they and each of them execute and deliver to the defendants like inequitable and unconscionable contracts and thereupon commence the payment of such wrongful and inequitable charge.

27. That the plaintiff Thurman is the owner of a tract of land in said Tract C, as alleged in the original complaint filed herein; but that the emergency that existed at the time of the filing of said original complaint had passed away, he having been, through the orders of this Court restraining the defendants from refusing to supply him water; but that he still has an interest in this suit, as have the others for whom he sues herein, he being threatened with the same irreparable injury as the plaintiffs Theilmann and Donovan.

28. That all the allegations of Par. 28 of the original complaint on file herein are, and were at the time of the filing of said complaint, true; but that the emergency therein sought to be relieved against has passed away, the plaintiff Thurman, and those for whom he sues herein, having been

supplied water for their summer crops through the order of this Court; but that the plaintiff Thurman, and those for whom he sues herein still have an interest in this suit, as set forth in the preceding paragraph.

29. That the plaintiffs Theilmann, Donovan, Thurman, and Griffin, are, and each of them is, as are each and every member of the classes of persons for whom they, and each of them, sue herein, able, ready, willing, and anxious to pay reasonable and proper charges for the service and supply of irrigating water to their said lands; and to pay the said estimated cost of said Yuma Project upon its completion, according to the terms of said contract of May 31, 1906.

30. That the defendants, in the pursuit and consummation of an unlawful and wrongful plan and scheme to compel all of the lands in said Tract C, notwithstanding the said estimate of cost of $35.28 per acre, so made as aforesaid by said Secretary of the Interior, [25] to bear the unlawful, unconscionable and inequitable charge of $75.00 per acre, and to compel all the owners of lands in said Tract C to agree to waive the rights, and to perform the inequitable things, more fully set forth in Par. 23 B hereof, threaten to, and will, if not restrained by the order of this Court, and through and by the unlawful and wrongful exercise of their control and management of said irrigation system now being operated by the United States Reclamation Service, upon, over and for all of the lands within said Tract C, shut off and will continue

to refuse to supply any waters whatsoever to any of said lands, and thereby reduce said lands to their former desert and waste condition unless the owners of said land execute and deliver to said defendants and unconscionable and inequitable contract, more fully set forth in Par. 23 B hereof, whereby they, and each of them, shall promise and agree to pay said wrongful and inequitable charge of $75.00 per acre upon each and every acre of irrigable lands within said Tract C, and agree to waive the rights, and perform the inequitable things set forth in said Par. 23 B, all to the great and irreparable damage of each and all of the plaintiffs, and those for whom they sue herein.

30½. That the plaintiff Archie J. Griffin is the owner of a tract of irrigable land consisting of 160 acres situate within said Tract A; that there are at least one dozen other tracts of land similarly situated, the owners of which are stockholders and constituents of the plaintiff corporation, and for whom said plaintiff Griffin sues herein; that continuously since the summer of the year 1909, the U. S. Reclamation Service has furnished said lands with an ample supply of water for the irrigation and reclamation thereof; that said lands are capable of a higher degree of cultivation and productivity if furnished with an ample supply of irrigating water—which is available for, and has been lawfully appropriated therefor, as hereinbefore set forth, flowing the Colorado River; that the defendants, *if* furtherance of their plan and scheme to compel all the landowners in said Tract C to exe-

cute and deliver said unconscionable and inequitable contract, as hereinbefore set forth; and for the purpose of weakening the [26] plaintiff corporation, financially and by depriving it of its moral influence amongst its stockholders, now threaten to, and will unless restrained by the order of this Court, shut off, and refuse to deliver, irrigating water to said land in said Tract A, from and after Dec. 31, 1917, and thereby render said lands worthless, and reduce them to their original desert condition; although there is an ample and sufficient supply of the waters of said Colorado River impounded behind the Laguna Dam of said Yuma Project for the irrigation of said lands; unless the plaintiff Griffin, and those for whom he sues herein, abandon their connections with the plaintiff corporation, and form a new corporation, or Irrigation District, for the purpose of dealing with the defendants for the supply of said water; notwithstanding that said last-mentioned lands are pledged and mortgaged to the plaintiff corporation to secure the payment of the costs and charges of said Project as a whole; to the great and irreparable injury of the plaintiff Griffin and those for whom he sues herein.

31. That the said unlawful plan and scheme of the defendants, if consummated and carried out according to their unlawful intent, will have the effect of violating the terms and conditions of the agreement of May 31, 1906, a copy of which is annexed hereto as Exhibit "C," in that the cost per acre of said Project will not be equal throughout all of

said Irrigation District, but, on the contrary, there will be a charge of $75.00 per acre made and collected upon all of the lands within said Tract C and no charge whatsoever per acre will be levied upon any of the lands in Tracts A and B, all to the great and irreparable damage of each and all of the plaintiffs; and in that the construction charge for said Project will be unlawfully made payable and be unlawfully collected prior to the completion of said Project.

32. That the plaintiffs have not, nor have any of them, nor have any of the persons for whom they sue herein, any plain, speedy or adequate remedy at law; and each and all of the plaintiffs are remediless save for such relief as may be granted from the equitable side of this Court. [27]

33. That the plaintiffs Theilmann, Thurman, Donovan, and Griffin are now ready to plant crops on their said tracts of land, and are ready, able and willing to pay the proper and necessary costs and charges for the service of water thereto and therefor; that unless they can procure an immediate supply of such water it will be impossible for them to raise crops, to their immediate, great and irreparable loss, and that such loss will result immediately; that it is in the interest of justice that a Preliminary Injunction be issued herein restraining the defendants from refusing to supply to said plaintiffs, and all for whom they sue herein, irrigating water for their respective tracts of land, and commanding them to permit the water in said ditches to flow onto said tracts of land to suffi-

ciently and properly irrigate the same for said crops, until the further order of this Court.

Wherefore, plaintiffs pray that a Preliminary Injunction be issued herein, restraining, until the further order of this Court, the defendants, and each of them, their successors, aides, agents and employees, from refusing to supply irrigating water to the lands within said Tracts A and C, and the lands of the plaintiffs Theilmann, Donovan, Thurman and Griffin, and those for whom they sue herein; and commanding said defendants to permit water to flow onto said lands in sufficient quantities to properly irrigate the same and to raise crops thereon; and to desist from diverting water from said lands, or any part thereof, during the pendency of this suit; and until the full completion of said Yuma Project; and restraining and enjoining the defendants, and each of them, their successors, aides, agents and employees, from endeavoring, by threats or otherwise, to compel the shareholders of the plaintiff corporation, or any of them, to execute and deliver to the defendants, or any officer, or person whomsoever, any contract or agreement whereby said shareholders, or any of them, will agree to pay as the cost and charge of the construction of said Project, the sum of $75.00 per acre, or any greater sum per acre than $35.28 per acre; and that on the final hearing of this case such Injunction be made permanent, and that plaintiffs have such other and [28] further relief as

to this Court may seem just; and that plaintiffs have their costs herein expended.

THOMAS D. MOLLOY,
FRED. L. INGRAHAM,
Attorneys and Solicitors for Plaintiffs.

State of Arizona,
County of Yuma,—ss.

James M. Thacker being first duly sworn, deposes and says, that he is a shareholder in, and President of, the plaintiff corporation, and is one of the class of persons sued for in the foregoing complaint, and makes this verification for and on behalf of the plaintiff corporation and all the other plaintiffs named in the foregoing Complaint; that he has read the foregoing Complaint, and knows the contents thereof, and that the same is true in substance and in fact except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

JAMES M. THACKER.

Subscribed and sworn to before me this 15 day of December, 1917.

[Seal] THOMAS D. MOLLOY,
Notary Public.

My commission expires 6/21/19. [29]

**Plaintiffs' Exhibit "A."**

ARTICLE IV.

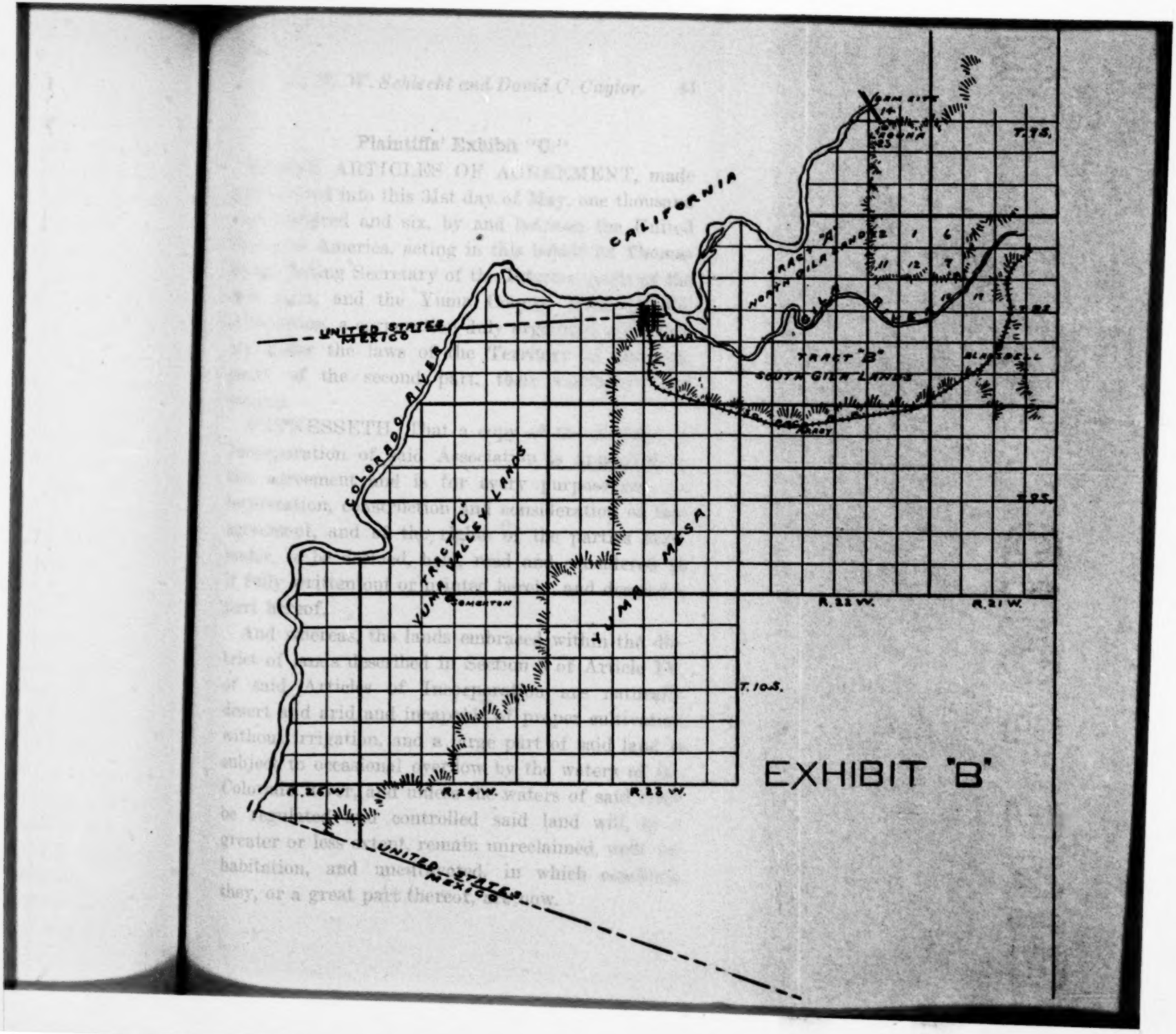
Section 3. The territory within which are the lands to be irrigated as aforesaid shall be known as the Lower Colorado Irrigation District; and shall include lands within the boundaries described as follows, that is to say:

Commencing at the point where the Gila River converges with the Colorado River, thence up the Gila River to a point directly north of the Blaisdell station on the Southern Pacific Railway, thence to said Blaisdell station, thence westerly along the edge of the Mesa to the south line of the town of Yuma, thence westerly along said line to the edge of the Mesa, thence southwesterly along the edge of the Mesa to the northern boundary of Mexico, thence westerly along said boundary to the Colorado River, thence up said River to the point of beginning; together with any public or other lands on which rights to the use of water from reservoir or irrigation works referred to in Section 2 of this Article shall be issued by the Secretary of the Interior.

ARTICLE IV.

To the Irrigation District, as described in Section 3 of Article IV, shall be added the lands bounded as follows: Beginning at the intersection of the center lines of the Colorado and Gila Rivers; thence up the center of the Gila River to the intersection of the river with the line between Sections 17 and 18, T. 8 S., R. 21 W., G. and S. R. M.; thence due north to the NE. corner of Section 7 of said township and range; thence due west to the quarter corner common to Sections 2 and 11, T. 8 S., R. 22 W., thence due north to the quarter corner common to Sections 14 and 23, T. 7 S., R. 22 W.; thence due west to the center of the Colorado River; thence in a southerly direction down the center of the Colorado River to the point and place of beginning.

[30]


CALIFORNIA
UNITED STATES
MEXICO
COLORADO RIVER
YUMA
TRACT "A"
NORTH GILA LANDS
TRACT "B"
SOUTH GILA LANDS
TRACT "C"
YUMA VALLEY LANDS
MESA
YUMA
T. 9 S.
T. 10 S.
R. 22 W.
R. 21 W.
R. 26 W.
R. 24 W.
R. 23 W.
EXHIBIT "B"

**Plaintiffs' Exhibit "C."**

THESE ARTICLES OF AGREEMENT, made and entered into this 31st day of May, one thousand nine hundred and six, by and between the United States of America, acting in this behalf by Thomas Ryan, Acting Secretary of the Interior, party of the first part, and the Yuma County Water Users' Association, a corporation duly organized and existing under the laws of the Territory of Arizona, party of the second part, their successors and assigns,

WITNESSETH, That a copy of the Articles of Incorporation of said Association is appended to this agreement and is for every purpose and interpretation, construction and consideration of this agreement, and of the rights of the parties hereunder, to be deemed, held, read and considered as if fully written out or printed herein, and deemed a part hereof.

And whereas, the lands embraced within the district of lands described in Section 3 of Article IV, of said Articles of Incorporation are naturally desert and arid and incapable of proper cultivation without irrigation, and a large part of said land is subject to occasional overflow by the waters of the Colorado River, and unless the waters of said river be regulated and controlled said land will, to a greater or less extent, remain unreclaimed, unfit for habitation, and uncultuvated, in which condition they, or a great part thereof, are now.

And whereas, the Secretary of the Interior of the United States of America contemplates the construction of certain irrigation works under the provisions of an Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, in and across Colorado River at a point about 12 miles up the course of said Colorado River, above the confluence of the Gila River and said Colorado River, said point being near the Laguna Mountains, for the purpose of there impounding the waters of said Colorado River and otherwise regulating and controlling the flow of water therein, and works necessarily or conveniently incident thereto, for the use of said waters for the reclamation of arid lands along the course of said Colorado River; and

Whereas, the incorporators of said Yuma County Water Users' Association and its shareholders are, and under the provisions of its Articles of Incorporation must be, owners and occupants of lands to be irrigated from said works, and in addition thereto such incorporators, shareholders and constituents and their assigns or successors, must initiate rights to the use of wier from the said proposed irrigation works, to be constructed by the said Secretary of the Interior, as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior,

which rights shall be and thereafter continue to be forever appurtenant to designated lands owned by such shareholders and constituent members; and

Whereas, neither the relative priority and extent of the individual appropriations of such water heretofore made by said incorporators, shareholders and constituent members, nor the proportion of the entire waters of said watercourse that has been in the aggregate appropriated by them, and which are now vested rights, have been ascertained or determined, but said incorporators, shareholders and constituent members of said Association have agreed among themselves, by the terms and provisions of said Articles of Incorporation, upon the rules and principles by [32] and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined.

1. Now, therefore, if the said Secretary of the Interior shall authorize and shall cause the construction of said irrigation works, then in the determination of the relative rights of the shareholders of the said Association, and of their respective rights to the use of water acquired from the government under said act of Congress, the rules and principles set out in said Articles of Incorporation, for such determination shall be deemed the established rules and principles for that purpose.

2. That only those who are, or who may become, members of said Association, under the provisions of its Articles of Incorporation, shall be accepted as entrymen or applications for rights to the use of

water impounded, developed, or the supply of which is or may be regulated or controlled by said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said Association; and (2) the amount to be appropriated and developed in excess of the water now appropriated. The Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, this determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payments for the water rights to be issued to the shareholders of said Association, under the provisions of said act of Congress shall be divided into not less than ten equal annual payments, the first whereof shall be payable at the time of the completion of said proposed works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the Association. The cost per acre shall be equal throughout the entire district now proposed to be irrigated thereby, which said district is hereby defined as comprising the lands described and bounded in Section 3 of Article IV of the Articles of Incorporation of said Association, and also the lands described and bounded in Article IV of the Amendments of the

said Articles of Incorporation of said Association.

5. The said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the cost of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders, and promptly pay the sums collected by it to the Receiver of the local land office for the district in which such lands are situate; that it will promptly employ the means provided and authorized by the said Articles of Incorporation for the enforcement of such collections, and will not change, alter or amend its Articles of Incorporation in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessment contemplated or authorized thereby, shall be impaired, diminished or rendered less effective, without the consent of the Secretary of the Interior.

6. The United States shall in no manner be responsible for the sums collected by said Association until they have been paid into the hands of the receiver of the local land office as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior. [33]

7. That for the purpose of enforcing said collections, the Association will adopt and enforce proper by-laws, subject to the approval of the Secretary of the Interior, and not change them so as to in any wise impair their efficiency for said purpose, and

will otherwise do any and all things it is authorized to do in the premises.

8. That the Association will adopt and enforce such rules and regulations as it is authorized by its Articles of Incorporation to adopt and enforce, concerning the use of water by its shareholders and concerning the administration of the affairs of the Association, to effectually carry out and promote the purposes of its organization, within the provisions of said Articles of Incorporation, which rules and regulations shall be subject to the approval of the Secretary of the Interior. That if the Association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event it is understood that the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the Association as defined or modified by said Articles of Incorporation.

9. Persons who are not now members of the Association, but who may be or become the owners or occupants of land within the irrigation district described in Section 3 of Article IV, or of added lands provided for in that section and to whom rights to the use of water, from the proposed irrigation works may be issued, may, at the designation of the Secretary of the Interior, become members of the Association by subscribing to the stock thereof, and upon the compliance with the other conditions prescribed for such membership.

10. It is understood that in all the relations between the government and this Association and the

members of the Association, the rights of the members of the Association are to be defined and determined and enjoyed by and under the provisions of the said Act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and by the laws of Arizona, where not inconsistent therewith, where such rights have vested, modified if modified at all, by the provisions of the Articles of Incorporation of said Association.

11. Nothing contained herein, or to be implied from the fact of its execution, shall be construed, held or deemed to be an approval by the Secretary of the Interior, nor an adoption by him, of the Articles of Incorporation of said Association, in all their details as the form of organization of water users contemplated and authorized by Section 6 of said Act of Congress of June 17th, 1902; but such approval and adoption prescribed in said act shall have arisen. And when the Secretary of the Interior shall make, approve and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations, and such modifications thereof as the Secretary may, from time to time, approve and promulgate, shall be deemed and held to be obligatory upon this Association as fully and completely, and to every intent and purpose, as if they were now made, approved, promulgated and written out in full in this agreement, and are to be read and construed as if so done.

In witness whereof, the undersigned have here-

unto subscribed their names and affixed their seals the day and year first herein written.

[Seal] (Signed) THOS. RYAN,

Acting Secretary of the Interior for and on Behalf of the United States of America, Party of the First Part:

YUMA COUNTY WATER USERS' ASSOCIATION, Party 2nd Part,

By M. WINSOR, Sr., President,

[Seal] P. J. MILLER,

Secretary.

Attest:

WITNESSES: Homer Hamlin—S. B. Norton.

[34]

**Plaintiffs' Exhibit "D."**

Form B. 7—273 Yuma Filed....., Printed Feb., 1917.

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DEPARTMENT OF THE INTERIOR

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WATER-RIGHT APPLICATION FOR LANDS IN PRIVATE OWNERSHIP AND LANDS OTHER THAN HOMESTEADS UNDER THE RECLAMATION ACT.

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Act June 17, 1902 (32 Stat., 388); and Acts Amendatory Thereof and Supplementary Thereto.

YUMA PROJECT. SERIAL NO.....

State of.....

.....Unit.

.....

(Date)

1. I,....., in pursuance of the provisions of the Reclamation Act approved June 17, 1902 (32 Stat., 388) and acts amendatory thereof and supplementary thereto, especially the act approved August 9, 1912 (37 Stat., 265) and the act approved August 13, 1914 (38 Stat., 686), known as the Reclamation Extension Act, all hereinafter called the Reclamation Law, and the rules and regulations established thereunder, do hereby apply on behalf of myself, my heirs, executors, administrators and assigns for a water right for the irrigation of and to be appurtenant to.....acres of irrigable land as shown on plats approved by the Secretary of the Interior within the tract described as follows:

.....

Section.....

Township.....,

Range.....

.....Meridian, containing a total of..... acres.

2. The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the Project Manager or other proper officer of the United States, or of its successors in the con-

trol of the project, during the irrigation season for the irrigation of lands under said unit. If measuring devices are not installed at the land, the amount of water delivered shall be determined by the Reclamation Service official in charge of the project, a reasonable allowance being made for losses of water after passing the point of measurement.

3. I agree: (*a*) To pay the annual installments of the construction charge fixed by the Secretary of the Interior in public notice issued in connection with the unit above described on..... day of April, 1917, at $75.00 per acre of irrigable land, and in addition thereto the annual charges for operation and maintenance as prescribed by the Reclamation Extension Act, and all penalties which may accrue for failure to make payments at the proper time; (*b*) that the construction charge and each and all of said annual charges for operation and maintenance with accrued penalties shall be and the same are hereby made a lien upon the tract of land above described and all water rights now or hereafter appurtenant or belonging thereto and all improvements now existing or hereafter made thereon, promising, covenanting and agreeing to pay all taxes and other claims now or hereafter becoming a prior encumbrance, failing which, upon demand by any proper officer of the United States, or its successors in control of said project, the United States or its said successors may pay the same and add the amount thereof to the lien hereby created and recover the amount so paid as part of the said lien. [35]

4. Upon my failure to comply with the terms of the Reclamation Law, and the regulations thereunder, this application may, in the discretion of the Secretary of the Interior, be canceled by him with the forfeiture of all rights under the Reclamation Law and of all moneys theretofore paid hereon: Excepting, however, from the force and effect of this paragraph, any and every failure to make payments which shall become due and payable after the issuance of final certificate for the water right hereby sought under the Reclamation Law, a remedy for the failure thus excepted having been provided by said Law.

5. This application must bear the certificate, as hereto attached, of the water users' association under said project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the construction, and the operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States, or, where any such lien was given directly to the water users' association for the benefit of the United States, may be enforced through the medium of the water users' association; but the election of one remedy shall not preclude the United States from following the other. If the Secretary of the Interior has made no contract with a water users' association under said project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project, in default of

which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

6. I further agree that the United States and its successors in charge of the said unit shall have full control over ditches, gates, and other structures owned or controlled by the applicant or his successors in interest and which are required to deliver water hereunder, and proper officers and employees of the United States and its successors shall have at all times the right of access to the above-described premises whenever it is, in the judgment of the officer or employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control. And I do hereby give, grant, bargain, sell, and convey to the United States and its said successors the right for any such proper officer or employee to go and come upon any and all lands now or hereafter owned or held by me or them for said purpose and there exercise said control.

7. It is understood and agreed that the United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained, by me and my successors in interest undertaken to be kept and performed, to refuse to deliver water to said lands or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application, but shall be con-

sidered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

8. And I do hereby grant, bargain, sell, convey, and confirm to the United States of America and its successors in charge of the project all rights of way for ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures now constructed by or under the authority of the United States for or in connection with the said project, and all rights of way that may be or become necessary and suitable and that may be required for the prosecution and operation of the said project, and for the construction, maintenance, and operation of ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures that may be constructed by or under authority of the United States and its successors in charge of the project for and in connection with said project, to have and hold the same, together with all the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any wise appertaining to the United States of America and its assigns and successors in charge of the project for ever, subject notwithstanding to the conditions upon which this application is made.

8*a*. The applicant hereby releases the United States from any and all claims for loss or damage on account of (1) the exclusion of said lands or any part thereof, from the irrigable lands of said project, or, (2) the failure to supply water for the irrigation of any part of the land hereinbefore de-

scribed when such exclusion or failure is due to (*a*) the destruction, by flood, erosion, encroachment or other action of the Colorado River, of the levees erected by the Reclamation Service along the banks of said river, or (*b*) a change in the location of said levees when such change is considered necessary by the proper officials of the United States to prevent the destruction of said levees from the said causes. Lands so excluded shall be relieved from payment of all instalments of construction and of operation and maintenance charges which otherwise would thereafter come due from the lands so excluded.

9. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909 (35 Stat., 1109).

10. And I, the said....., being duly sworn, depose and say that my post-office address is.....; that I am a bona fide resident upon said land (or occupant thereof, residing in the neighborhood, namely, upon Section....., Township....., Range ....., ..... Meridian, a distance in a di-

rect line of.....miles therefrom); that I hold the following interest in the said tract:.....
..... ..... ..... .....
as duly shown upon the records of ..... County, ....., in volume (liber)..... at page (folio) .....; that no other application, now uncancelled, has been made for a water right under the Reclamation Law, appurtenant to land now owned or claimed by me, except as follows:

Application No. ...., .....Project, of..... for..... Section ...., Township ...., Range ....., .... Meridian, an area of....acres and containing ....acres of irrigable land as determined by the Secretary of the Interior; and that the present application is made in my own behalf and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly.

11. Nothing in this application contained shall be construed as in any manner or at all abridging, limiting, or depriving the United States of any means of enforcing any remedy in law or equity for the breach of any of the provisions of this application which it would otherwise have.

IN WITNESS WHEREOF, I,.....have hereunto set my hand and seal this.....day of ....., 191..

.....[Seal.]
.....[Seal.]

In presence of:

(Three witnesses must sign here.)

.....
.....
..... [36]

ACKNOWLEDGMENT.

State of Arizona,
County of.....—ss.

This instrument was acknowledged before me this ..... day of ....., 19.., by.....

My commission expires.....

.....
Notary Public.

State of.....
County of.....—ss.

....., being duly sworn, deposes and says that he is the person (or one of the persons) who signed the foregoing instrument; that he has read the same and knows the contents thereof and that all the statements of fact made by him in said instrument are true of his own knowledge, except such as are made upon information and belief and as to those he believes them to be true.

.....

Subscribed and sworn to before me this....day of...., 191..

My commission expires.....

.....
Notary Public.
....., 191..

I hereby certify that the applicant signing the above instrument has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described therein, and that all assessments levied against said

stock by this association have been fully paid up to date.

.....

Secretary.....Water Users' Association.

Approved and accepted this....day of...., 191.. by authority of the Secretary of the Interior.

.....

Project Manager.

[Endorsements]: No. E–59. Yuma Co. Water Users' Assn. et al. vs. W. W. Schlecht et al.

Amended Complaint. Filed this 27th day of December, at 10:30 A. M. Mose Drachman, Clerk. By Effie D. Botts, Deputy. [37]

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In the United States District Court for the District of Arizona.

PHOENIX E. 59.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Plaintiffs' Petition for Leave to Amend Their Complaint.**

To the Hon. WILLIAM H. SAWTELLE, Judge of said Court:

The plaintiffs respectfully move and petition the above-named court, and the Judge thereof, for

leave to further amend their complaint now on file herein, by interlineation, as follows, to wit:

I.

By adding to Paragraph I of the amended complaint on file herein, and at the end thereof, the following words and figures, to wit:

"That said plaintiff corporation also sues herein for relief for a class of its stockholders and constituent members, who are so numerous as to make it impractical to bring them all before this Court, and whose grievances and rights are more fully set forth in Paragraph 34 of this complaint as amended."

II.

By adding to said amended complaint another paragraph to be numbered 34, next after Paragraph 33 thereof, and before the prayer thereof, in the following words and figures, to wit:

"34. That at the time of the making of the said determination and estimate of cost by the Secretary of the Interior on May 10, 1904, many thousands of acres of the lands embraced in said Tract C were held in private ownership by numerous settlers and entrymen by virtue of Homestead and Desert Land Entries made by said settlers prior to the passage of the Reclamation Act of June 17, 1912, 32 Stat. 388; that each and all of said settlers and entrymen were on said May 10, 1914, shareholders and constituent members of the plaintiff corporation, among many others one Charles Theobald (whose case is typical of numerous others) who was then a settler upon and a homestead entryman of the

N. W. ¼ of Sec. [38] 17, Twp. 10 S., R. 24 W., G. & S. R. Mer., within said Tract C, by virtue of Homestead Entry No. 3816 made at the Tucson, Arizona, U. S. Land Office on May 5, 1901; that on or about July 12, 1902, notwithstanding that said last described tract of land was embraced within said Homestead Entry of said Theobald, the Secretary of the Interior purported to withdraw the same under the second form of withdrawal according to the provisions of the said Reclamation Act; That thereafter, and owing to the non-completion of said Yuma Project (notwithstanding the promises of said chief engineer and said supervising engineer) the said Theobald was unable to make such cultivation and improvements on the said tract of land embraced on his said Homestead entry as to permit him to offer a sufficient Final Proof thereon prior to the expiration of the life of said entry in the year 1908, and the said Theobald, because thereof, was compelled to, and did for a valuable consideration relinquish said land and entry to the United States for the use and benefit of one John W. Hevener (whose case is typical of numerous others similarly situated), who thereupon made a new homestead entry of said tract of land paying to the Receiver of the U. S. Land Office at Phoenix, Arizona, then the proper office to make entry of said land under the laws of the United States, the sum of $16.00 and having issued to him by said receiver a duplicate receipt for said sum of $16.00, in connection with his said homestead entry of said 160 acre tract of land, and also receiving from the

register and receiver of said office a certificate that his homestead entry for said 160 acre tract of land had been allowed, subject to his future compliance with the law; that thereafter the said Hevener continued to reside upon, cultivate and improve said 160 acre tract of land down to the present time, and in the year 1915, he offered and had accepted by the proper officer of the Interior Department of the United States, a sufficient Final Proof of his compliance with the Homestead laws of the United States as residence upon and cultivation and improvement of said tract of land, and has had issued to him by said Officers a certificate of such facts; that notwithstanding that the Secretary of the Interior had in the month of May, 1904, fixed the limit of area per entry within said Yuma Project, to wit: [39] 160 acres, and had by accepting said Hevener's payment of $16.00 for the entry of said 160 acre tract confirmed, ratified and refixed said limit per acre of numerous other like entries within said Tract C, the defendants will, prior to the termination of this suit, unless restrained by the order of this Court, shut off the supply of irrigation water to and from all of said 160 acre tracts of land, and numerous other tracts of land within said Tract C similarly situated to said Hevener tract of land, unless the said Hevener, and numerous other entrymen similarly situated to him, will conform their said entries to what is known as a Farm Unit, consisting of 40 acres of land, and no more, to the great and irreparable injury of the said Hevener, and numerous others similarly situated."

III.

By adding to the prayer of said complaint, and at the end thereof, the following words and figures, to wit:

"and that the defendants be permanently enjoined and restrained from shutting off the supply of irrigation water to and from the lands of the said John W. Hevener, to wit: the N. W. ¼ of said Sec. 17, Twp. 10 S., R. 24 W., and from the lands of all others similarly situated to him, unless he, and they, shall conform their entries to a Farm Unit of 40 acres."

And plaintiffs shall ever pray.

THOS. D. MOLLOY,
Solicitor for Plaintiffs.

[Endorsements]: E–59. Yuma Co. Water Users' Assn. et al., Plaintiffs, vs. W. W. Schlecht and David C. Caylor, Defendants. Filed April 28, 1919. Mose Drachman, Clerk. [40]

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In the United States District Court for the District of Arizona.

E–59.—PHOENIX.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, JOHN A. DONOVAN, and RALPH THURMAN,
Plaintiffs,

vs.

W. W. SCHLECHT and R. S. FESSENDEN,
Defendants.

**Answer.**

Come now W. W. Schlecht and R. S. Fessenden, the defendants above mentioned, and for answer to the complaint on file herein, or to such parts thereof as they deem material and necessary to answer, say:

"A."

Defendants allege that this Court is without jurisdiction of the parties to and the subject matter of this action; that the acts of the defendant sought to be and now in part temporarily enjoined by the Court herein are acts done and alleged to have been done by defendant under the authority and direction of the Secretary of the Interior; that the Secretary of the Interior in directing and requiring defendant so to act is acting in the exercise of judgment and discretion vested in him by the acts of Congress relating to reclamation matters and in accordance with the rules and regulations made in pursuance of the terms of the Reclamation Act of June 17, 1902, (32 Stat., 388), and of acts supplementary thereto and amendatory thereof; that such acts are acts of a political and executive character, and as such are not subject to interference with or examination by the judiciary of the United States, and that the acts of the defendants herein under the direction and [41] authority of the Secretary of the Interior are not the ministerial acts of said Secretary, and are not unlawful, but are solely discretionary and executive and involve the exercise of discretion and judgment by the Secretary of the Interior for which he and the defendants, acting

under his direction herein, are not accountable to the judiciary in any action at law or equity, and the Court has no jurisdiction or power to control by injunction or otherwise the discretion vested by law in the Secretary of the Interior as a part of a coordinate branch of the Government, to wit; the Executive branch thereof, exercised within the scope of his authority. And that it is without the jurisdiction of this Court to directly or indirectly take the property of the United States out of the control or management of the United States. That the purpose of the complaint on file herein and the relief sought thereby is to take the management and control of the Yuma Project from the United States, and that no injunction will lie against officers of the United States to restrain or control the use of property belonging to and already in its possession. That the United States and the Secretary of the Interior are indispensable parties defendant, and the real parties in interest.

"B."

As a further alternative and additional defense and without waiver of the others herein, defendants hereby allege and show to the Court that this suit should be dismissed and held for naught because of insufficiency of fact apparent upon the face of the bill of complaint to constitute a valid cause of action in equity; and for specific grounds thereof, among others to be assigned at bar, defendants say: [42]

"That nowhere in said complaint is there a showing of fact nor is there any reason in law

upon which the injunction prayed for therein, either temporary or permanent, as the case may be, could properly be granted; that all of the allegations in said complaint taken together fail to show any lawful or adequate reason why all owners of lands covered by the public notice of April 6, 1917, and subscribed to said plaintiff association, should not file water right application within the time prescribed in said notice and under the conditions therein named and thereby agree to pay the construction cost therein prescribed, to wit: $75 per acre, and to pay when due as set forth in said public notice the installments thereof, applying to said lands and every of them; that none of the allegations in said complaint nor the things therein attempted to be shown, present any lawful or adequate reason for the issuance of the injunction, whether temporary or permanent, prayed for therein, or why the construction cost thereof should be $35.28 instead of $75 per acre, or that the Secretary of the Interior, defendants, or either of them, or anyone under the law, would have the power or right to reduce the said $75 per acre to a less sum.

"C."

And without waiver of any of the defenses to said complaint hereinbefore set forth, and as an alternative and additional defense thereto, defendants say:

1. Defendants admit the allegations of paragraph 1 in so far as they relate to the corporate

existence of the Yuma County Water Users' Association and the location of its principal place of business, to wit; at Yuma, Yuma County, State of Arizona; but defendants deny that the recital of the powers of said association as thus organized is correct in said complaint wherein it is alleged that said Association is a corporation: [43]

"* * * with power, among other things to enter into an agreement with the proper officers of the United States of America with reference to the collection and payment of any and all charges made under the Federal Statutes for the work of providing water for the land of its shareholders and to comply with the provisions of any Federal Statutes applicable to the work by the United States in connection with the system of water supply known as the Yuma Project of the United States Reclamation Service, for certain tracts of land known as the Lower Colorado Irrigation District, which said tracts of land are more particularly described in Section 3 of Article IV of the Articles of Incorporation of said corporate plaintiff, and in Article IV of the Amendments to said Articles, copies of which are annexed hereto, marked Exhibit 'A,' and made a part of this Complaint; and which said tracts of land are situated in Township 7 South, Range 22 West, Townships 8 South, Ranges 21, 22, 23 and 24 West, Townships 9 South, Range 23 and 24 West, Townships 10 South, Ranges 24 and 25 West, and Townships 11 South, Ranges 24 and

25 West, all in Gila and Salt River Meridian, Yuma County, State of Arizona";

but alleges that said powers are as described, defined, and limited in the Articles of Incorporation of said Association, particular reference being had to Sections 2 and 3 of Article IV, wherein it is provided that

> Section 2. * * * this Association shall have power to enter into any contract or other arrangement, or undertake in whatsoever manner and by whatsoever means may be deemed proper or convenient therefor, to secure action by or the aid of the United States Government in the construction, erection or acquisition of any dams, reservoirs, canals, wells, or other works or property, or appurtenances necessary thereunto, for storage, development, diversion, distribution, or delivery of water to lands of shareholders of this Association, or to aid therein, and to enter into any agreement with said Government which may be approved by the Secretary of the Interior or any duly authorized official or representative of the Government with reference to the collection and payment to the Government of any and all moneys which may be due the Government under or by reason of rights issued by the Government to members of this Association, for the use of water from any reservoir or irrigation works acquired or constructed by said Government, or in the acquisition or construction of which it may have aided, and to comply with any con-

ditions, rules or regulations prescribed by Congress or by any executive department or official of said Government lawfully authorized thereunto, concerning the storage, diversion, delivery, application, or use of any water so stored, developed or delivered to the stockholders [44] of this Association or by means of any works constructed or acquired by the Government or in the construction or acquisition of which the Government may have aided, or which it may hereafter construct or acquire, or in the construction or acquisition of which it may hereafter aid.

Section 3 (as amended by Article IV of Amendments). The territory *within which* are the lands to be irrigated as aforesaid shall be known as the Lower Colorado Irrigation District; and shall include lands within the boundaries described as follows, that is to say:

Commencing at the point where the Gila River converges with the Colorado River, thence up the Gila River to a point directly north of Blaisdell station on the Southern Pacific Railway, thence to said Blaisdell station, thence westerly along the edge of the Mesa to the south line of the town of Yuma, thence westerly along said line to the edge of the Mesa, thence southwesterly along the edge of the Mesa to the northern boundary of Mexico, thence westerly along said boundary to the Colorado river, thence up said river to the point of beginning; together with any public or other lands on which

rights to the use of water from reservoir or irrigation works referred to in Section 2 of this Article shall be issued by the Secretary of the Interior."

Beginning at the intersection of the center lines of the Colorado and Gila rivers; thence up the center of the Gila river to the intersection of the river with the line between Sections 17 and 18, T. S., R. 21 W., G. & S. R. M.; thence due north to the N. E. corner of Section 7 of said township and range; thence due west to the quarter corner common to Sections 2 and 11, T. 8 S., R. 22 W.; thence due north to the quarter corner common to Sections 14 and 23, T. 7 S., R. 22 W.; thence due west to the center of the Colorado River; thence in a southerly direction down to the center of the Colorado River to the point and place of beginning.

Defendants allege that the so-called Lower Colorado Irrigation District referred to in said paragraph 1 of the complaint has represented at no time heretofore nor does it now represent or mean more than a definition or rough outline of the territory within which the Yuma project, in so far as situated on the east side of the Colorado River, might be developed; such development depending upon the practicability and feasibility of the undertaking; that it has been determined to be impracticable and infeasible to include within the Yuma project lands generally described in said complaint as within Tracts A and B of the so-called [45] Lower Colorado Irrigation District. Defendants

deny that if they or either of them are not enjoined or restrained from the perpetration of any acts, whether the same be wrongful or unlawful or otherwise, the plaintiff will be damaged to the extent or in the sum of three million five hundred thousand dollars, or any portion thereof or in any amount whatsoever, and deny that they or either of them have committed, have threatened or do now threaten or intend to commit any wrongful or unlawful acts whatsoever.

2. As to whether plaintiff Theilmann is a resident or citizen of Yuma County, State of Arizona, or as to whether he is one of the shareholders of the plaintiff corporation or the owner of a tract of land described in said complaint as the SE. ¼ of Section 8, Township 10 South, Range 24 West, or any part thereof defendants are without knowledge, except that defendants are informed and believe, and therefore allege that said Theilmann is the owner of some land, now subject to the public notice of April 6, 1917, hereinafter described, for which stock has been subscribed, and he is obligated and bound to initiate a water right under the Yuma Project by making and filing water right application as provided in said notice. Defendants deny that if they or either of them are not enjoined and restrained from the perpetration of any acts, whether the same be wrongful or unlawful or otherwise, said plaintiff Theilmann will be damaged to the extent or in the sum of $6,000, or in any sum, and deny that they or either of them have heretofore committed or threatened to commit, or do now threaten or intend

to commit, any wrongful or unlawful act whatsoever. As to whether there is a class of persons similarly situated to plaintiff Theilmann, or as to whether said persons are so numerous as to make it impractical to bring them all [46] before this Court defendants are without knowledge. However, defendants deny that any of said above-named class of persons, if such there be, will be damaged in a sum of money in excess of $3,000 or in any sum whatsoever if acts by said defendants, or either of them, whether wrongful or otherwise, are not restrained.

3. As to the residence or citizenship of plaintiff Donovan, whether the same be in Yuma County, State of Arizona, or otherwise, or as to whether he is one of the shareholders of the plaintiff corporation, or the owner of two tracts, or of any tract or tracts of land, within the so-called Lower Colorado Irrigation District, or elsewhere, defendants are without knowledge; except that defendants are informed and believe and therefore allege that plaintiff Donovan is the owner of some land; subject to the public notice of April 6, 1917, hereinafter described, for which stock has been subscribed and he is obligated and bound to initiate a water right under the Yuma Project by making and filing a water right application as provided in said notice. Defendants deny that said plaintiff Donovan will be damaged to the extent or in the sum of $3,200, or in any amount or sum, if defendants or either of them are not enjoined or restrained from the perpetration or any acts of any character, whether the

same be wrongful and unlawful or otherwise, and defendants deny that they or either of them have committed, have threatened, or do now threaten or intend to commit, any wrongful or unlawful acts of any character whatsoever. As to whether there is a class of persons similarly situated to plaintiff Donovan, or as to whether said persons are so numerous as to make it impractical to bring them all before this Court, defendants are without knowledge, but defendants deny that any of said persons [47] if such there are, will be damaged in a sum of money in excess of $3,000 or in any sum if acts of defendants, whether the same be wrongful or otherwise, are not restrained, and deny that they or either of them have committed, have threatened or do now threaten or intend to commit any wrongful acts whatsoever.

4. As to the residence or citizenship of plaintiff Thurman, whether the same be in Yuma County, State of Arizona, or otherwise, or as to whether he is one of the shareholders of the plaintiff corporation or the owner of any tract of land, within the so-called Lower Colorado Irrigation District, or elsewhere, defendants are without knowledge; except that defendants are informed and believe that plaintiff Thurman is the owner of some land subject to the public notice of April 6, 1917, hereinafter described, for which stock has been subscribed and he is bound to initiate a water right under the Yuma project by making and filing water right application as provided in said notice. Defendants

deny that said plaintiff Thurman will be damaged to the extent or in the sum of $3,200, or in any amount or sum if defendants or either of them are not enjoined or restrained from the perpetration of any acts of any character, whether the same be wrongful and unlawful or otherwise, and defendants deny that they or either of them have committed, have threatened, or do now threaten or intend to commit, any wrongful or unlawful acts of any character whatsoever. As to whether there is a class of persons similarly situated to plaintiff Donovan or as to whether said persons are so numerous as to make it impractical to bring them all before this court, defendants are without knowledge, but defendants deny that any of said persons, if such there are, will be damaged in a sum of money in excess [48] of $3,000, or in any sum, if acts of defendants, whether the same be wrongful or otherwise, are not restrained, and deny that they or either of them, have committed, have threatened, or do now threaten or intend to commit any wrongful acts whatsoever.

5. Defendants admit that the personal plaintiffs herein, in so far as they own land subject to the public notice of April 6, 1917, may have an interest in subject of this suit and in obtaining the relief herein demanded, but defendants are without knowledge as to whether the plaintiff corporation has any interest. Defendants allege that all and each of said plaintiffs are not entitled to the relief demanded in this suit, or to any part thereof.

6. Defendants allege that they and each of them

are citizens of the United States, that defendant Schlecht has resided in the city of Yuma, Yuma County, State of Arizona, since his arrival there in the month of February, 1917; that he was appointed as project manager for the Yuma project on or about the 31st day of March, 1917, and that he is now domiciled in said Yuma County; that defendant Fessenden resided in Yuma County for more than a year and was during that period the duly appointed and acting irrigation manager for said project under the project manager thereof, and was domiciled in said Yuma County, State of Arizona; that at or about the time of the beginning of this suit, to wit, on June 30, 1917, he having tendered his resignation from the Government Service some weeks previously, said defendant wholly severed his connection with the Yuma Project and the [49] operations thereof and is now wholly unconnected therewith, officially, or otherwise, having taken up his residence and domicile and undertaken work elsewhere than in Arizona; that this suit (and in this defendants in no manner waive the defense that said suit is improperly brought against each and both of said defendants and that the Court is without jurisdiction therein) should be dismissed as to defendant Fessenden and said defendant Fessenden eliminated as a party defendant therein. Defendants further allege that they and each of them during the time of their official connection with the Yuma project as above set out were not only claiming to act as officers of the United States in the Reclamation Service thereof, but were duly ap-

pointed, qualified and acting officers of the United States in said service during the times aforesaid and in the capacities above stated, and that defendant Schlecht continues to be and now is the duly appointed, qualified and acting project manager of the Yuma project; that they and each of them as such officers have been, and defendant Schlecht now is, acting under and in pursuance of the Act of Congress approved June 17, 1902, known as the Reclamation Act, and acts supplementary thereto and amendatory thereof, hereinafter sometimes referred to as the Reclamation Law, and under and in pursuance of rules, regulations and instructions properly and lawfully issued and promulgated by authority of said Reclamation Law and in no other manner, that defendant Fessenden during his official connection with the Yuma project was a subordinate officer, acting by the authority and under the instructions of the project manager of said project. Defendants further allege that they and each of them have not had and do not have any personal interest or share in said Yuma project [50] or matters related thereto, or any personal or private interests to be served in the conduct thereof.

7. Defendants admit that if this suit can be properly brought against defendants in contradiction of their defenses made in this answer, that the same may be regarded as arising under the laws of the United States of America, and as involving the construction thereof, but as to the amount or value, if any, of the matter in dispute, exclusive of interest and costs or otherwise, or as to the amount or value

of the matter in dispute as between any of the plaintiffs and defendants herein, exclusive of interests and costs or otherwise, defendants are without knowledge; but allege that it is immaterial and irrelevant as to whether such amount or value, or each of such amounts or values, exceeds the sum of $3,000, exclusive of interests and costs, or amounts or amount to any sum.

8. Defendants admit the allegations of plaintiffs with reference to the division of the so-called Lower Colorado Irrigation District by natural boundaries into three separate tracts referred to as A, B, & C, and as to the location and designation of said tracts; but deny that all lands in said district, except a few one hundred and sixty acre (or less) tracts in tracts A & B and two 40 acre tracts in said Tract C, or that any more of said lands than hereinafter alleged, on June 17, 1902, or at any time prior thereto, were in private ownership. Defendants are informed and believe and therefore allege than no more of said Tracts A and B were in private ownership on June 17, 1902, or prior thereto, than 6,500 acres out of a total of about 21,000 acres, and no more of Tract C than 8,260 acres out of a total of about 59,000 acres; that the lands in private ownership have increased but slowly since said [51] date, and is even now much less than alleged by plaintiffs.

9. Defendants deny the accuracy of the allegations in said complaint, to wit:

> "that in the fall of the year 1902, the Secretary of the Interior, the United States of America, under and by virtue of the provisions

> of said Reclamation Act, caused to be made examination and surveys of said irrigation district and the Colorado River with the object and purpose, if the same should be by him deemed practical to locate and construct irrigation works for the diversion and development of the waters of said river for the irrigation and reclamation of all lands within said irrigation district,"

and allege, on the contrary, that the facts were that examinations and surveys in pursuance of the Reclamation Act were made in or about the fall of the year 1902 on the Colorado River and over the lands on either side thereof in the vicinity of Yuma, including the lands or a large portion of the lands contained within the boundaries of the so-called Lower Colorado Irrigation District, said surveys having for their purpose the determination in preliminary fashion of the practicability and feasibility of the erection of irrigation works in that vicinity, the primary item being a diversion dam across the Colorado River about 12 miles above the city of Yuma, for the irrigation and reclamation of such portion of the lands along said Colorado River and including such portion of the territory within the so-called Lower Colorado Irrigation District as might thereupon or thereafter prove practical and feasible; defendants admit that in or about the summer or fall of said year 1902 the said Secretary of the Interior withdrew from public entry lands upon the Colorado River required for the construction of a dam across said river for the purpose of diverting

irrigation water from said river for the irrigation of lands, but allege that the lands to be thus irrigated were only those, the irrigation [52] and reclamation of which, might thereupon or thereafter be determined as practicable and feasible by the Secretary of the Interior or by him determined to be such as could or should be irrigated and reclaimed under and in pursuance of law and through the funds available thereunder; that it has been determined to be impracticable and infeasible to irrigate and reclaim lands in Tracts A and B of said Lower Colorado Irrigation District.

10. Defendants say that the recital in 10th paragraph relating to the determination of the practicability, the advisability, the setting aside of money and the letting of contracts for the construction of the Laguna Dam and levees, is interwoven with inaccurate and misleading statements, and that the matters and things in said recital can best be denied, admitted, or explained by way of a statement by defendants of the facts in that regard; therefore defendants allege that on or about May 10, 1904, the Secretary of the Interior, acting under the provisions of the Reclamation Act, and after the consideration of certain preliminary maps and surveys theretofore made, did determine the Yuma Irrigation project to be practicable, and thereupon and thereafter set aside the sum of three million dollars out of the Reclamation funds then available for the purpose of starting work on said project, and caused certain contracts to be entered into for the construction of a weir across the Colorado River commonly

known as the Laguna Dam, and for the construction of levees along the banks of the Gila and Colorado Rivers for the purpose of protecting from overflow the lands lying adjacent thereto, including some of the lands within the so-called Lower Colorado Irrigation District; that the aforesaid determination of the practicability and advisability of said project defendants [53] are informed and believe and therefore allege covered in a general way the matter of the construction of the primary works therefor, and the determination that there were lands along and on either side of the Colorado River, including some of the lands within the so-called Lower Colorado Irrigation District, which were susceptible of reclamation and irrigation from said works, that said works were of sufficient capacity to irrigate the same and that the actual selection and location of said lands as to specific parcels or tracts, the determination of their irrigability and susceptibility of irrigation from said works, was necessarily then only made in a large and general way and would be subject to modifications, additions, and subtractions, as developments would demonstrate the practicability of their reclamation and irrigation from said works. Defendants deny that the Secretary of the Interior, or anyone, did thereupon, to wit, on the 10th day of May, 1904, or at any time prior to April 6, 1917, determine or estimate the cost of the construction of said Yuma project, or that he or anyone did then or at any time as aforesaid, for or in connection with said project cost, whether exclusive of the cost of operation and maintenance or other-

wise, determine and estimate, or give public notice of, the charges which should be made per acre upon all or any of the lands within the so-called Lower Colorado Irrigation District or Yuma project to be irrigated by the waters to be developed by said project. Defendants deny that any determination or estimate or public notice of the charges per acre was ever made in connection with said Yuma project in the sum of $35.28, or in any sum at all prior to said 6th day of April, 1917, or that there was prior to April 6, 1917, ever any attempt to apportion said or any sum over any of the [54] lands in the so-called Lower Colorado Irrigation District, or that any public notice of the lands irrigable under said Yuma project or of the number of annual installments within which the charges should be paid or of the time when such payments should commence was made prior to the 6th day of April, 1917, when proper and lawful public notice of the lands to be irrigated and charges thereon and the time of payment thereof, within the so-called Lower Colorado Irrigation District, was made and promulgated as hereinafter described. Defendants further say that they are informed and believe and therefore allege that the three million dollars alleged in said complaint to have been set aside for the construction of said project was insufficient therefor, and that in fact many additional hundreds of thousands of dollars have been expended in the construction of said irrigation works and many more hundreds of thousands in the construction of levees for the protection of project lands. As to public notice for the

said Yuma project, defendants allege the facts to be that on the sixth day of April, 1917, the Secretary of the Interior, acting in pursuance of the provisions of the Reclamation Law, did estimate and determine and give public notice of the changes to be assessed on account of the project cost against all irrigable land within the limits of the Lower Colorado Irrigation District, which were susceptible of irrigation and reclamation from the waters of the Colorado River, diverted by and through the medium of the aforesaid Laguna Dam and other irrigation works of the Yuma project, and that he did at the same time and through the same instrumentality give public notice of all the lands in private ownership within the limits of said Irrigation District which it was practicable to irrigate and reclaim from the said irrigation works and the [55] time, place and manner of initiating the procuring of water rights under said project for said lands. And defendants further allege that said public notice, copy of which is annexed hereto marked defendants' Exhibit "A," and by this reference made a part hereof as fully and completely as though set out herein at length, is the only public notice ever given of the lands irrigable under said project within the so-called Lower Colorado Irrigation District, of the charges which should be made per acre thereon, of the number of annual installments in which such charges should be paid, of the time when such payments should commence, the determination of charges being had with a view of re-

turning to the reclamation fund the estimated cost of said project.

11. Defendants allege that plaintiffs in paragraph 11 have not accurately or fully described the circumstances and conditions under which said plaintiff corporation was organized or the purposes thereof or the conditions obtaining in connection with the charging of the lands of the shareholders thereof with the payment of project costs; that they are informed and believe and therefore allege that said plaintiff corporation was organized soon after and in one of the years immediately following the passage of the Reclamation Act of June 17, 1902, with a capital stock divided into 500,000 shares, that there was ample provision in the Articles of Incorporation (although said 500,000 shares were supposed to represent a possible 500,000 acres within said Yuma project) whereby the Government was empowered and required to determine at the proper time, to wit, as in the public notice of April 6, 1917, the number of acres capable of irrigation and reclamation under said project, and which it would be practicable to irrigate and reclaim thereunder, and for the final allotment of shares [56] of said corporation corresponding to said number of acres; that the Department of the Interior through its Secretary and his subordinates, rendered such aid and assistance as was proper in the organization of said Association, which was undertaken in connection with and as an early preliminary to the construction of said Yuma project, that the Articles of Incorporation of said Associa-

tion, particularly section 2 of article 4 thereof, describes the powers in that connection and the purposes of its organization, they having to do among other things with securing the aid of the United States in the construction of said Yuma project and providing for the guarantee of the payment thereof direct by said association where appropriate of all moneys due the United States for the irrigation works constructed and acquired and for water rights therein and in that connection; that the subscribers for stock in said corporate plaintiff were required to be land owners within the so-called Lower Colorado Irrigation District, and that such of said subscribers as were or should be ultimately allotted shares in said Association according to the lands designated by the Government to be irrigated from the Yuma project would be held by virtue of their stock subscription contract, and articles of incorporation of said association made part of said contract, to have subjected their lands to the condition that assessments made by said association in connection with the collection of the project cost as determined by the Secretary of the Interior should become from time to time as they are made and levied a lien on the lands of such shareholders and upon the shares of stock appurtenant to such lands and of rights and interests represented by such shares. That defendants allege that the public notice of [57] April 6, 1917, furnishes a basis for the allotment of the shares of said Association as provided in the Articles of Incorporation thereof.

12. As to whether on May 10, 1904, alleged to be the time of making of an estimate of cost of the Yuma project by the Secretary of the Interior, which has been heretofore and is again denied, or at any time prior to the construction of said project, there were in active operation for the supply of water to any lands within the so-called Tract C, or Yuma Valley lands, three or any number of irrigation projects or canal systems operated by separate corporations or otherwise, as common carriers or public agents for the conveyance of water or otherwise, or as to whether large portions or any of the lands within said Tract C were actually served with irrigation water therefrom, or as to whether there had been an appropriation or attempt to appropriate water from the Colorado River in that connection defendants are without knowledge; except that they are informed and believe and therefore allege that about three concerns attempted to construct and operate canals, and to serve lands with water in said Tract C; that said canals and related works were primitive and imperfect, that water service therefrom was but sporadic and occasional on these accounts and because of floods and lack of levee protection; and that not more than twenty per cent of the lands in Tract C were ever even thus ineffectively served with water from said canals or from any source prior to the construction of the Yuma Project; defendants deny that on May 10, 1904, or at any time prior to April 6, 1917, the Secretary of the Interior made any such estimate of the cost of the Yuma

project as described in said paragraph by way of reference to those preceding, or otherwise. [58]

13. Defendants deny that on or about May 28, 1904, the Secretary of the Interior had made any estimate of cost in the sum of $35.28 per acre or in any sum or had given public notice thereof or that any estimate of cost for any lands within said lower Colorado Irrigation District was made or promulgated or made the subject of public notice prior to April 6, 1917. As to whether one F. H. Newell, described by plaintiff as chief engineer of the United States Geological Survey now the United States Reclamation Service, or one J. B. Lippincott, described by plaintiff as supervising engineer of said Geological Survey, now the United States Reclamation Service, ever made any statements, promises or representations to the effect that the Yuma Project could and would be completed at an estimated cost of $35.28 per acre or within two years from the commencement of said work thereon, or any other statements or representations or promises of like character or in the same connection at Yuma, Arizona, on May 28, 1904, or at any time, defendants are without knowledge; but defendants deny that if any statements to the above effect or in any similar connection or regard were ever made by said F. H. Newell or J. B. Lippincott, that they were authorized by the Secretary of the Interior on behalf of the United States or under the provisions of said reclamation act or otherwise, and allege that if any such statements, representations, or promises were ever made by said F. H. Newell,

or said J. B. Lippincott, or anyone else, said persons were then without authority to bind, or act in behalf of, the Secretary of the Interior or the United States of America. Defendants deny that any owners or occupants of any lands within the so-called Lower Colorado Irrigation District, by reason of reliance upon or belief, in said alleged estimate of $35.28 [59] per acre or by reason of the reliance upon the said alleged representations, promises or statements of F. H. Newell or J. B. Lippincott, became shareholders of the plaintiff corporation or pledged or mortgaged their respective tracts or any tracts of land to secure the payment of said alleged estimated cost or otherwise, or that any of said owners or occupants of lands were in any manner induced by said alleged estimate or said alleged representations or promises to become such shareholders or to so pledge or mortgage their lands or that any thereof so acted in consideration of those things or any of them. Defendants are without knowledge as to how many of said alleged owners or occupants of lands on or about May 28, 1904, or at any time became shareholders, or rather, subscribers for stock, in said plaintiff corporation and are without knowledge as to the amounts or areas of the lands held by such owners or occupants, but defendants deny that if such owners or occupants as did become such shareholders had known or believed or could have foreseen that the cost per acre of said Yuma Project or the cost placed upon their lands for the construction of said project could have or would have exceeded the sum of

$35.28 per acre they would not have become such subscribers or pledged their lands; but instead the defendants are informed and believe and therefore allege that such occupants and owners as did become such subscribers or as did pledge their lands were in no manner induced or persuaded to so do by said alleged estimate or said alleged representations or promises of Newell or Lippincott above mentioned, but so subscribed their lands to said project with the full understanding that they were being pledged to the cost thereof whatever it might be. [60]

14. As to the whereabouts of plaintiff Theilmann on May 28, 1904, or as to whether said plaintiff was then or at any time has been the owner of the SE. ¼ of section 8 as alleged or of any land defendants are without knowledge, except that defendants are informed and believe and therefore allege that plaintiff Theilmann is the owner of some land subject to above described public notice of April 6, 1917, for which he is bound and obligated to initiate a water right by the making and filing of water right application as provided in said notice. Defendants deny that on May 28, 1904, or at any time prior to April 6, 1917, the Secretary of the Interior gave public notice of the estimated cost of the construction of the Yuma project or of the irrigation or reclamation of any lands within the so-called Lower Colorado Irrigation District, and deny that plaintiff Theilmann could have been fully advised in the premises as alleged. Defendants are without knowledge as to whether any

shares by said plaintiff corporation have been allotted to plaintiff Theilmann, but deny that such subscription for stock as he may have made (evidently the act referred to by plaintiffs) or that such pledge or mortgage of his lands as was made in that relation occurred or was done on account of hearing or believing in alleged representations or promises of the persons described as chief engineer and supervising engineer or either of them, or in consideration thereof or on account of being induced thereby, or because he believed in or relied upon the said alleged estimate of $35.28 per acre heretofore and now denied by defendants to have been made or public noticed. And defendants further deny that said plaintiff, unless he believed in and relied upon the said alleged representations of the said [61] chief engineer and supervising engineer would not have subscribed for stock in the plaintiff corporation or would not have pledged or mortgaged his lands in that connection; but defendants allege that plaintiff Theilmann in thus subscribing for stock and in so pledging or mortgaging his lands so did, and acted with the others in the same relation, who thus subscribed and for whom he sues, in order that the great public work of the Yuma Project might be assured and to the end that he and they and his lands and their lands might be bound to pay the proportion of the cost of said project assessed thereon, whatever it might be. As to whether said plaintiff had then or at any time any right of any kind to have water delivered to him from an irrigating canal company or as to

whether there was any such company or it was a going concern, or as to whether he was receiving or could have continued to receive an ample or sufficient supply of water or any water for the irrigation of any land defendants are without knowledge except that defendants are informed and believe and therefore allege that no irrigating canal company situated as described by plaintiff could have given assurance of its right to divert for said plaintiff any continuous or other supply of water for his said land for any time, and that such companies as did exist in that region had always but primitive and imperfect systems of canals and works and on account thereof and of floods due to lack of levees could supply but occasional, if any, water for irrigation, and could assure no future services. Defendants further deny that said plaintiff Theilmann believed that the cost per acre of said project would or could not exceed the sum of $35.28 per acre, or that he would not have so pledged or mortgaged his land had said plaintiff believed or could [62] he have foreseen that the cost per acre of said Yuma Project or the cost to be placed upon his lands for the construction thereof could or would have exceeded the sum of $35.28 per acre, and deny also that any other land owners or occupants of land within the so-called Lower Colorado Irrigation District would not have pledged or mortgaged their lands if they could have foreseen that the said cost would have exceeded the sum of $35.28 per acre. As to the number of such owners or occupants or as to whether they are too numerous to

be brought before this court defendants are without knowledge, but defendants allege that such of said owners or occupants, including said plaintiff Theilmann, as have become subscribers for stock in said association, are bound to make and file water right applications for their lands and thereafter and thereunder to pay their full proportion of the proper cost of the Yuma Project as provided in the public notice by the Secretary of the Interior of April 6, 1917.

15. Defendants deny that any of the owners or occupants as the same are described in said complaint or otherwise were induced to pledge or mortgage their said lands in any manner whatsoever by any determination by the Secretary of the Interior or by representations by any engineers, or that if any of said land owners or occupants had believed or could have foreseen that said project would not be constructed as a whole or at a cost per acre equal throughout all of said irrigation district they would not have so pledged or mortgaged their lands; and defendants allege that there can be no possible significance or virtue in the allegations of plaintiffs concerning the construction of the project as a whole or concerning [63] the cost per acre equal throughout all of said irrigation district as used in paragraph 15 of the complaint for the reason that it is impracticable to irrigate and reclaim the lands in Tracts A and B, and the public notice of April 6, 1917, heretofore referred to, is thus an official determination under the law of the lands within said Lower Colorado Irrigation District that shall

be contained within the Yuma project, and that as to said lands the cost per acre by said notice is made equal throughout all of the same.

16. Defendants deny that the Secretary of the Interior ever made or has made from examination and surveys or otherwise any determination that the construction of the Yuma project involved or called for the irrigation and reclamation of said Lower Colorado Irrigation District as a whole, or that a system of levees and ditches for irrigation or necessary drainage for, or reclamation of any larger part of said district was practicable or advisable than that portion covered by the public notice of April 6, 1917. As to whether on the 28th day of May, 1904, or at any time the said chief engineer or supervising engineer promised or represented to the plaintiff corporation or to any of the owners or occupants of the land within the so-called Lower Colorado Irrigation District that said project could be or would be constructed as a whole with a levee, ditch and drainage system or otherwise, at a cost per acre of $35.28, or at any cost, to be equal throughout all of said irrigation district, or that all of said tracts designated A, B and C of the so-called district could or would receive water for their irrigation or reclamation at the same time, or as to whether any other representations by said officers or others of this or any [64] character were ever made, defendants are without knowledge, but defendants allege that if any such were made they were in no way authorized by the United States or by the Secretary of the Interior

nor any other officer, and that the United States cannot in any way be held to be bound thereby.

17. Defendants admit that on or about May 31, 1906, the Secretary of the Interior, acting in behalf of the United States of America, entered into an agreement with the plaintiff corporation, a copy of which agreement is annexed to the complaint and marked Exhibit "C." As to how far and to what extent the plaintiff corporation in entering into said agreement acted for or on behalf of its shareholders or shareholders to be, or of other plaintiffs herein, defendants are without knowledge except that they are informed and believe and therefore allege that said corporation was acting for those who had subscribed for stock therein in so far as the State laws and Articles of Incorporation provided therefor. Defendants allege that the recitals of the terms of said contract in paragraph 17 of the complaint are inaccurate and refer to said plaintiff's Exhibit "C" in that relation; that a correct statement of the substance of said contract in relation to the matters referred to by plaintiff would be that said contract provided that the payment for water rights under the project should be divided into not less than ten annual payments, the first thereof to be payable at the time of the completion of the proposed works or within a reasonable time thereafter, and the *the* cost per acre should be equal throughout all of such portion of the Lower Colorado Irrigation District as would be in said project, and that the said Association agreed to [65] promptly collect and require payment

from its shareholders of the cost of said works and did guarantee the payment of said cost which should be apportioned by the Secretary of the Interior to its shareholders. Defendants deny that said contract taken by itself or in connection with the Articles of Incorporation of said association or its by-laws in any manner provides for or implies that all of the lands within said Lower Colorado Irrigation District should be irrigated or reclaimed, or that the cost should be assessed upon all of said lands or be equal or applied to all thereof, or indeed that there should be any more of the lands of said irrigation district irrigated or reclaimed or assessed for the cost of said project than should thereafter be designated and determined to be susceptible of irrigation and practicable to be irrigated from the works of said project by the Secretary of the Interior; and defendants allege that the lands covered by public notice of April 6, 1917, now constitute and have now been determined to be that portion of the said Lower Colorado Irrigation District that is and shall be within said Yuma project.

18. Defendants admit that Tracts A and B so-called, as alleged in said complaint, have not been reclaimed, irrigated or protected by levees in connection with the Yuma project, except that defendants deny that any portion of Tract A has been reclaimed or is capable of irrigation and reclamation, and deny that no drainage has been provided for Tract C, now in a general way covered by public notice of April 6, 1917; alleging that on the contrary drainage has been provided for the same in

so far as practicable and feasible and the necessity therefor is revealed, and that proper provision has been made for the necessary drainage [66] thereof. Defendants refer to previous paragraphs of this answer in the following relation and in addition deny that there was ever any estimate or determination by the Secretary of the Interior, or ever any representations or promises of any engineer or engineers, or that there is anything in said agreement of May 31, 1906, which ever have involved, required or called for the reclamation, irrigation or protection of Tracts A and B, or either of them, or that the irrigation or reclamation of said Tracts A and B, or either of them, are in any way a prerequisite to the completion of the Yuma project as a whole. Defendants further deny that forty-four percentum or any part of the Yuma project remains uncompleted as alleged by plaintiff and allege that said project within said Lower Colorado Irrigation District has been completed in so far as it is practicable or feasible to irrigate and reclaim the lands therein. Defendants allege that irrigation works have been completed in so far as practicable for lands which are susceptible of irrigation from said project and by way of its primary structure, the said Laguna Dam, including all lands within the so-called Lower Colorado Irrigation District which are susceptible of irrigating therefrom; also that it is impracticable to reclaim and irrigate from said project and dam the lands in Tracts A and B, due to the meanderings of the Colorado and Gila Rivers and other unsur-

mountable physical difficulties. Thus defendants deny that 44 per centum, or any per centum, of the Yuma project remains uncompleted, and in that regard, particularly refer to the fact that works have now been constructed for all lands within the Lower Colorado Irrigation District which it is practicable to irrigate from said project, and that water [67] right applications are now receivable therefor under said notice of April 6, 1917, but defendants show the Court that even if there were a possibility of developments in future years whereby some of the lands in Tracts A and B or either of them could be irrigated and reclaimed from the Yuma project, there is nothing in the reclamation law that would require, nor has said law authorized the Secretary of the Interior, or anyone, to represent or contract that no units of the Yuma projects shall be open by public notice and no land owners required to conform thereto until all possible developments, no matter how remote in connection with said project, or particularly in connection with said Lower Colorado Irrigation District, have been accomplished; and further that there is nothing in said complaint or in the law to show that the injunction prayed for in said complaint, whether temporary or permanent, should be granted, or to show that owners and occupants of lands covered by said public notice of April 6, 1917, should be excused from making water right applications or payments under said notice because of the designation of the land covered thereby as a unit of said project, or because of the possibility, if there should be one, that

other lands may eventually be added thereto and become then a part of said project.

19. Defendants admit that work was begun upon said project in the summer of the year 1905, but allege that the works thus commenced were for the irrigation and reclamation of such lands on each side of the Colorado River that is should prove practicable to irrigate and reclaim including only such lands within the said Lower Colorado Irrigation District as should come within that class. [68—28] Defendants admit that a contract was let for the construction of the Laguna Dam to J. G. White & Company under the penalty of a bond, but deny that said bond was for more than $160,000; admit that said contract provided for the completion of said dam within two years from the commencement of work thereon, that the contracting corporation began work on said dam on or about the first day of August, 1915, and that said work was not completed within two years; but defendants are without knowledge as to any promises or representations by said engineers, and in any event deny that they were authorized or in any manner bound or could bind the United States. Defendants deny that through the fault or neglect of any officer or employee of the Reclamation Service or the United States, whether the Secretary of the Interior or any other, that said work was not completed on or about the first day of February, 1908. Defendants are without knowledge as to whether any officer or employee of the Reclamation Service, or the Secretary of the Interior, released said construction corporation from any of its covenants or agreements or the

penalty of any bond or any part thereof, but allege that if there was any such action justifiable and lawful reasons exist therefor. Defendants are informed and believe and therefore allege that the delay in completion of the said Laguna Dam was occasioned by physical, natural and other conditions beyond the control of those responsible for the construction thereof, and that all due measures were taken to provide for losses from the Reclamation fund in that connection; said dam was completed and ready for use before the time when it was possible to provide for the first irrigation of lands within the said Yuma Project. As to whether the director and chief enginneer [69—29] at any time represented that there was no probability that said work of the construction of the said dam could not be completed within any reasonable time in the future or that it was impossible to determine with any reasonable degree of certainty when said work could or would be completed defendants are without knowledge, but allege that such statements if made were unauthorized but could in no manner be held to bind the United States. As to whether any corporations operating canals and serving water to lands in Tract C were interrupted in or put out of business or prevented from operating or furnishing service, or were no longer able to furnish a sufficient supply of irrigating water for the lands theretofore served, or as to whether said lands were threatened with a scarcity of water or with being reduced to their original desert condition, or as to whether said corporations were common carriers or public agents defendants are without knowl-

edge, but deny, if any of such things did occur, that they were caused by the threatened competition of the United States by means of the Yuma Project or were in any manner the fault of the Government or its officers, and deny that the security for the payment of the estimated cost of the Yuma project was by any of these things to any extent depreciated, or that the United States was prompted by any of the conditions thus referred to when it purchased and acquired as alleged in said complaint and took over the management and control of any of said irrigating canal systems; but defendants are informed and believe and therefore allege that the purchase of said canal systems by the Government was merely one of the logical and proper steps in the development of the Yuma project to the end that the lands to be served by the canals thereof might have a uniform status [70—30] and to the end that the economic and effective construction of the project irrigation system might not be delayed or interfered with. Defendants are informed and believe and therefore allege that the United States, of said systems, operated for a brief period only one of the same, and then merely saw to it, pending its replacement by or absorption into the Yuma project, that the lands thereunder should have the necessary amount of water to preserve their crops, and that the United States in relation to said canals or any of them acted in no way as a common carrier or public agent; that said canals or canal systems, or or about June 1, 1912, were replaced by or absorbed into the canal system of the Yuma project. Defendants deny that

the United States promised, agreed or undertook, or became by operation of law or otherwise obligated, to operate any of said canals or to supply water therefrom to any lands within the said Yuma project for any length of time or at all; but allege that on or about June 1, 1912, when the system of Yuma project was prepared to deliver water to lands within said Tract C, that there and thereafter water was furnished to such of said lands within said Tract C as entered into contracts with the United States, made upon full and adequate consideration wherein the contractors agreed and covenanted that such furnishing of water should under no circumstances become the basis of a permanent water right and that the United States should have the right to stop furnishing and delivering water at any time under certain limitations expressed in said contracts upon first giving the required notice of its intention so to do. Defendants further allege and respectfully show the court that allegations contained [71] in said complaint with reference to the canal systems existing in Tract C before the construction of the Yuma project are irrelevant and immaterial to the issues in this case.

20. Defendants deny that all of the lands within said Yuma project, or within the so-called Lower Colorado Irrigation District are highly productive if furnished with an ample supply of irrigation water, and allege on information and belief that a very large portion of the lands in Tracts A and B of said Lower Colorado Irrigation District would not be productive if furnished with an ample supply of irriga-

tion water, and that even some of the lands in Tract C are not so productive, although, in such instance applications for water rights have not been made receivable therefor. Defendants on the other hand allege that practically all of the lands within the exterior boundaries of the Yuma project as now constituted are highly productive when furnished with sufficient irrigation water but that without such water such lands are practically worthless. As to the character of the lands of plaintiffs, Theilmann and Donovan and Thurman in these regards, defendants are without knowledge, except that they are informed and believe and therefore allege that such of the lands of such defendants as are covered by the public notice of April 6, 1917, and designated therein as irrigable are highly productive when furnished with irrigating water. As to what extent the lands of plaintiffs Thielmann and Donovan or of the classes of persons for whom they sue herein have been brought to a high state of cultivation, or have now growing thereon available crops of cotton or permanent crops of alfalfa, or as to the value thereof, defendants are without knowledge, [72] but defendants allege that such state of cultivation and crops and crop values as have been produced were accomplished by way of water through the project canals furnished upon a rental basis, the contracts in that regard providing that such furnishing of water should under no circumstances become the basis of a permanent water right and that the United States under the conditions therein named should have the right to stop furnishing and delivering

water at any time upon first giving the prescribed notice of its intention so to do. Defendants deny that they have committed or have attempted or are now attempting or intend to commit any unlawful or wrongful acts whatsoever, or that unless they are restrained in that relation the crops aforesaid or any part thereof would be utterly or otherwise ruined or destroyed, or that said lands or any part thereof would be reduced to their original condition, but plaintiff alleges the facts to be that such crops as are growing on any of said lands will be preserved and saved from loss or if said plaintiffs and those for whom they sue merely continue to make use of irrigation water under their existing rental contracts, and at the proper time and in accord with the law and as required in said public notice of April 6, 1917, make and file application for water rights thereunder.

21. Defendants deny that at the time of the purchase or acquisition of the irrigating canals heretofore referred to, in the year 1908, or at any time, the United States of America, acting through its Secretary of the Interior or anyone, or otherwise, promised or agreed or undertook to furnish or to continue to furnish water to [73] all or any lands within said Tract C until such time as said Yuma project should be fully completed as alleged or otherwise, it being again alleged by defendants that they are without knowledge as to the promises or representations of the chief engineer or supervising engineer in that regard, but that if such promises or representations were made they were not only

unauthorized but in any event could not bind the United States. Defendants further deny that any determination in reference to the said project was made by the Secretary of the Interior prior to that contained in the public notice of April 6, 1917. Defendants are informed and believe and therefore allege that only a small portion of the lands in Tract C, to wit, certainly not more than 20 per cent thereof received water from such irrigation companies as were serving water in that territory prior to the construction of the Yuma project, reference being had to previous allegations herein as to the imperfect, sporadic, and occasional character of such service, and allege that all others of said lands within Tract C had never received any water whatsoever from any source. Defendants deny that all or any of the lands covered by said public notice of April 6, 1917, now have or ever had, appurtenant or vested water rights of any character in the waters of the Colorado river, or that the owners or occupants of said lands now, have or ever have had, vested rights of any character in the use of said waters for their respective tracts or otherwise, but allege that the United States has supplied certain of said lands through the project system with waters for the irrigation thereof under water rental contracts, each determinable on notice and each specifically providing that they shall not be made the basis of a permanent water right, such right being securable by way of the filing of water right application under public notice of April 6, 1917. [74]

22. Defendants admit that defendant Schlecht not only claims and has claimed to act as an officer and employee of the Reclamation Service but allege that he is and has been for some months last past, to wit, since March 1917, the project manager of the Yuma project duly appointed by the Secretary of the Interior in pursuance of the provisions of the Reclamation Law and the regulations promulgated thereunder. Admit that he is exercising and has since his said appointment exercised control and management of the canal system situate in said Tract C and constructed for the irrigation of lands therein; but defendants allege that the said control and management is in pursuance of the Reclamation Law, the regulations promulgated thereunder and lawful instructions issued to him by his superior officers in the Reclamation Service, and that the things required to be done by him in the said public notice of April 6, 1917, are in accord with the Reclamation Law and as thus commanded are acts in which he has no choice but to obey. Defendants admit that not only that defendant Fessenden was claiming to act as an officer and employee of the Reclamation Service, but also that he was at the time of the commencement of this suit and for more than a year prior thereto the irrigation manager of the said Yuma project under which office however he was continually subject to the orders and instructions of the project manager, that while in said office he acted in accord with said instructions and the Reclamation Law. It is respectfully shown to the court, however, that his resignation from the

Reclamation Service and of his said office was presented sometime prior to the filing of this suit and was accepted and [75] made effective soon after the service upon him of process herein and that he has since that time ceased to act as an officer on said project and has resided in another state. That his request to have this suit dismissed as against him and that he be eliminated as a party defendant herein has heretofore in this answer been presented to the Court.

23. Defendants deny that the Secretary of the Interior on May 10, 1904, or at any time prior to April 6, 1917, ever made a determination or estimate of cost in relation to any of the lands within said Lower Colorado Irrigation District, and deny that any estimate of cost in that relation was ever made in the sum of $35.28 per acre, or in any sum other than $75 per acre, as set forth in the public notice of April 6, 1917. Defendants are without knowledge as to any alleged promises or representations of the chief engineer or supervising engineer, but deny that if any such were made that they were in any manner authorized or could in any way bind the United States; deny that said Yuma project is uncompleted to the extent of 44 per cent thereof, and allege that the same is completed within the so-called Lower Colorado Irrigation District to the full extent that is practicable, to wit, to the extent set forth in the said public notice of April 6, 1917; deny that the Secretary of the Interior or director and chief engineer, or any officer, made any promises or agreements in connection with the furnish-

ing of water to lands in Tract C until the full completion of said project as alleged by plaintiffs or for any time, but defendants allege that water has and will be furnished to such lands within said Tract C as require the same, and as were covered by water rental contracts [76—36] prior to April 6, 1917, pursuant to said contracts and subject to their terms until such time as water right applications are required to be made for such lands by said public notice of April 6, 1917, and that thereafter water will be furnished therefor in pursuance of such water right applications. Defendants further deny that they or either of them are or have been in any manner acting with unlawful purpose or intent, or that any requirements are being or have been imposed by anyone upon plaintiffs or any of them or upon any shareholders or subscribers for stock in plaintiff association with reference to the execution or delivery of any contract or with reference to the water supply for their lands other than the terms and conditions of the public notice of April 6, 1917, wherein it is provided that water right applications thereunder for lands in Tract C covered thereby shall be made and filed after December 31, 1917, for lands covered by water rental contracts prior to said notice as a condition precedent to the further delivery of water, and that such water right applications shall be made and filed for all other lands covered by said notice as a condition precedent to such delivery. Defendants deny that such water right applications, which are obviously the contracts referred to by plaintiffs, are unconscionable or in-

equitable, or that the charge of $75.00 per acre, named in said public notice and formally agreed to be paid in said water right applications is wrongful, unlawful or inequitable, but allege that on the contrary said water right applications, and the public notice to which they relate, and the charge per acre prescribed therein are eminently proper and just and in accord with the law. Defendants deny that plaintiffs or those for whom they sue or anyone [77] can or will be injured in any way in the above relation, and respectfully show that it would be unlawful and against the facts to restrain defendants or anyone in the matter of the making or filing of said water right applications or as to the requirement of said public notice that water be not furnished in the event of neglect, failure or refusal to make and file water right applications in accord with its terms. Defendants further deny that $75 per acre is in excess of any estimated cost whatsoever or that there was ever any estimate of cost made in the sum of $35.28 or in any sum less than said $75 per acre. Defendants further allege that said plaintiffs and all owners of land covered by said public notice who are subscribers for stock in plaintiff association are bound and obligated by their covenants and agreements to initiate water rights under the Yuma Project for their lands by way of the making and filing of water right applications therefor as prescribed by said public notice. Defendants further allege that defendant Fessenden, as heretofore shown, since the date of his separation from the Yuma project, can and will have

no connection therewith, relation thereto, or control thereover, and can therefore have nothing to do with the matters referred to by plaintiffs in said paragraph 23; that said public notice of April 6, 1917 and its requirements that water right applications be made thereunder was promulgated and put in force by the Secretary of the Interior, and defendant Schlecht can in no way or manner assume, have, or undertake any control over the operation of the provisions and requirements thereof, and that he is bound by his oath of office to administer the same in so far as he is instructed or required so to do, and that his duties in [78] that regard are limited to the receipt and acceptance of water right applications under said notice and the fulfilling of its instructions in the matter of supplying water or the shutting off of the same; that in all these things he is and will be acting in absolute accord with the Reclamation Law and in pursuance of lawful regulations and instructions issued thereunder, and neither has nor will have any personal interest to be served in the premises.

24. Defendants admit that the ability of the plaintiff corporation to meet its obligations as a practical matter depends largely upon the ability of its shareholders to meet and pay the dues, charges, and assessments levied against the same and upon the lands thereof. Defendants deny that the lands of any of the shareholders or subscribers for the stock of the plaintiff corporation will be rendered barren or desert or become valueless or that it will be impossible for such shareholders to pay

dues or assessments or any part thereof unless acts of the defendants, whether wrongful, unlawful or otherwise, are restrained by this court; and deny that they or either of them have committed, have threatened or threaten to or intend to commit any wrongful or unlawful acts whatsoever. Defendants further deny that the contract referred to by plaintiffs, to wit, the water right application required to be made and filed under the terms and conditions set forth in said public notice of April 6, 1917, is either unconscionable or inequitable and allege on the contrary that the same is eminently just and proper and in accord with the law. Defendants further deny that the obligations of the plaintiff corporation with reference to project cost under the provisions of the agreement with the Secretary of the Interior dated [79] May 31, 1906, or otherwise, are or can be held to call for a guarantee of less than the $75.00 per acre prescribed by the said public notice of April 6, 1917, and allege that said obligations would not therefore in any manner be increased by the making and filing of water right applications under said public notice. Defendants allege that said lands when properly cultivated and irrigated will yield crops of sufficient value to meet and pay installments on a charge greatly in excess of $75 per acre of irrigable land, and still leave remaining enough returns to pay a good rate of interest upon the principal invested over and above a reasonable wage for the labor necessary for the proper irrigation and cultivation of the lands against which assessments may be levied.

25. As to whether plaintiff Theilmann is the owner of the S. E. ¼ of Section 8, T. 10 S., Range 24 West, G. & S. R. Meridian, defendants are without knowledge except that they are informed and believe and therefore allege that plaintiff Theilmann is the owner of some land in said Lower Colorado Irrigation District within the area covered by the said public notice of April 6, 1917. Defendants are without knowledge as to the extent or character of the crop being raised by plaintiff or as to its requirements of water for irrigation, but deny that said plaintiff has ever been refused an ample and sufficient supply of irrigation water for the proper cultivation of any crops growing on his said land, or that defendants or either of them or any one is now or has ever threatened to shut off irrigation water necessary to mature the crops on said land. Defendants allege that on a date subsequent to the time when growing crops shall have been matured and harvested, to wit, after December 31, 1917, [80] the delivery of water in pursuance of the said public notice of April 6, 1917, will be discontinued unless and until said plaintiff Theilmann make and file a water right application, according to the form set out in Defendants' Exhibit "B," attached hereto and made a part hereof, which in effect and substance formally agrees to the terms of said public notice, calling for the payment of $75 per acre of irrigable land, payable in either ten or in twenty annual installments, without interest in any sum whatsoever, but exclusive of operation and maintenance costs, (which, as required by the Secretary

according to law, are required to be paid annually); applicant for water right having the privilege under prescribed conditions of electing which plan of payment—whether in ten or twenty installments—he prefers. Defendants deny that the said water right application, which obviously is the contract referred to by plaintiffs, is unconscionable or inequitable and allege on the contrary that it is just and proper and in accord with the law, and that defendant in pursuance of the covenants and agreements is bound and obligated to make and file the same and to thus formally agree to return the cost of the construction of the Yuma project as lawfully determined by the Secretary of the Interior by way of said public notice of April 6, 1917. Defendants allege that the crops of plaintiff cannot be ruined or become a loss in whole or in part, and that said land need not return to a desert or any less productive condition, for the reason that water in any event will be furnished under the existing water rental contract, subject to the repayments required thereunder, up to December 31, 1917 and for the reason that if plaintiff fulfills his just contracts and [81—41] obligations by way of the making and filing of water right applications as aforesaid, and thus initiates a water right under said project, he will be able to raise further crops on said land from year to year. Defendants deny that the Secretary of the Interior or anyone ever made or promulgated an estimate of cost in connection with any of the lands of the so-called Lower Colorado Irrigation District of $35.28 per acre or in any other sum than $75 per acre.

Defendants further deny that said charge of $75 per acre is wrongful or unlawful and allege that on the contrary it is a lawful and proper one, and deny that plaintiff will be injured greatly or irreparably or otherwise or in the sum of $6,000 or in any sum, or that the persons for whom plaintiff sues or any of them will be injured in any manner or amount whatsoever if defendants be not restrained as prayed by plaintiffs, or by conforming with the requirement of said public notice that they and each of them make and file a water right application thereunder, calling for payment, at times and installments in said public notice designated, of $75 per acre, and providing that water will not be delivered to their said lands after December 31, 1917, until such applications are made and filed. Defendants further deny that the said water right application, which is obviously the contract referred to by plaintiff, and which need not be made until after the present crop season, is an unconscionable or inequitable contract but alleges on the other hand that it is eminently just and proper and in accord with the law, and that the persons for whom plaintiffs sue are obligated and bound by their covenants and agreements to make and file such water right applications to thus formally agree to pay said charge of $75.00 [82] per acre and properly designated in the said public notice of April 6, 1917.

26. As to whether plaintiff Donovan is the owner of an undivided half of the S. ½, S. ½ of Section 12, T. 9 S., Range 24 West, Gila and Salt River Meridian, situate within said Tract C, or is

the owner of any land within the limits of Tract B, defendants are without knowledge, except that they are informed and believe and therefore allege that said plaintiff Donovan has an interest as owner in some land in said Tract C and within the area covered by the aforesaid public notice of April 6, 1917, and subject thereto. Defendants deny that any lands in Tract B which may be owned by plaintiff or otherwise are within the Yuma project. As to whether plaintiff Donovan as to his alleged lands in said Tract C, or as to any lands, is successor in interest to one Thos. Lyall, or as to whether said Lyall in 1904 or at any time was the owner of the S. ½, S. ½ of said Section 12, or as to whether said Lyall at any time subscribed for stock or became a shareholder in said plaintiff corporation defendants are without knowledge, except that they are informed and believe and therefore allege that the land now owned by Donovan in Tract C is covered by subscriptions for stock in plaintiff association. Defendants deny that if said Lyall did subscribe for such stock that he did so because he believed and was induced by promises or representations of the chief engineer or supervising engineer aforesaid or because of the said alleged determination or estimate of cost made by the Secretary of the Interior; and deny that said Secretary of the Interior ever made any such determination or estimate of cost affecting the lands in said Lower Colorado Irrigation [83] District prior to April 6, 1917, or that said lands were pledged or mortgaged for any other sum than $75.00 per acre on account of project cost.

As to whether said chief engineer or supervising engineer made any promises or representations defendants are without knowledge but allege that if any such were made they were without authority and in no manner could bind or obligate the United States. Defendants further deny that plaintiff Donovan in purchasing or acquiring any land, or in connection with whatever land he may have purchased or acquired, in said Tract C, ever relied on any estimate or upon any promises or representations; deny that if he had believed or could have foreseen that any greater sum than $35 would be charged or attempted to be collected for the cost and expense of said Yuma project, or if he had believed or foreseen that any charge greater than $35 per acre would be made or attempted to be made or collected from him, or would be made or attempted to be made or collected at any time prior to his alleged completion of said Yuma project, he would not have purchased or acquired such lands he did so purchase and acquire. Defendants allege that the Yuma project within the so-called Lower Colorado Irrigation District, instead of being uncompleted as alleged by plaintiff, is now and was on April 6, 1917, in so far as practicable and feasible, fully completed; and that plaintiff Donovan in pursuance of his covenants and agreements was obligated to make water right application therefor in pursuance of the aforesaid public notice of April 6, 1917, and to pay the charges named therein, to wit, $75 per acre, in installments and at the times designated by said notice. In reference to the S. ½, N. E. ¼ of

Section 29 in Tract B (plaintiffs' description of the same "as in [84—44] Tract C" here being evidently a typographical error) defendants are without knowledge as to whether plaintiff Donovan is the owner or successor of Concepcion Armenta or anyone, or as to whether said Concepcion Armenta in the year 1904, or at any time, was the owner of said land or as to whether said Armenta ever subscribed for stock in the plaintiff corporation for said lands or any part thereof or in any manner pledged or mortgaged the same for any purpose; but defendants allege that if said Armenta did subscribe for such stock, or give or impose any pledge or mortgage incident thereto, that the same was not done because of any belief or reliance upon any determination of estimate, or upon any promises or representations, or upon any determination of the Secretary of the Interior that said project would be completed as a whole, or upon any promises or representations of the chief engineer or supervising engineer that said project would be completed within two years from the time of the beginning of work thereof. Defendants allege further than no determination or estimate as to project cost, area or the like was ever made prior to April 6, 1917; that they are without knowledge as to any promises or representations of the chief engineer or supervising engineer or anyone in the above relations, but that if any such were made they were without authority and could in no manner bind the United States. Defendants deny that the Secretary of the Interior made any determination as alleged by

plaintiffs, about the completion of the projects as a whole and refer to the allegations herein as to the completion thereof. Defendants allege in relation to alleged pledging and mortgaging of the said tract of land, the same being within Tract B and not [85] covered by public notice of April 6, 1917, or as to such lands of plaintiff Donovan as may be within Tract B, inasmuch as the same are not within the Yuma project and no allotment of shares in pursuance of subscriptions for stock can be made therefor, that no effective pledge or mortgage has been imposed thereon; that plaintiff Donovan neither has suffered nor can suffer any injury or damage in connection with said lands. Defendants further deny that any purchase which may have been made by plaintiff Donovan of any lands was done on account of his belief in or reliance upon any determination or estimate of cost or any representations or promises, or upon any covenants or agreement of Exhibit "C," and deny that plaintiff would not have purchased or acquired said land had he believed or foreseen that the said alleged determinations and estimates, promises and representations or covenants of said agreement, would not be put in effect, kept or consummated. Defendants further deny that any other determination or estimate of cost than that embodied in the public notice of April 6, 1917, was ever made with reference to any of the lands within the so-called Lower Colorado Irrigation District, or that the terms of said contract or any thereof shown in Exhibit "C" have not been complied with or fulfilled. Defendants are

without knowledge as to the representations or promises referred to, but allege that if any such were made they were without authority and in any event could not bind or obligate the United States. Defendants further allege and show the court that they and each of them have not committed and do not now threaten or intend to commit any wrongful or unlawful acts or any such as are without warrant of law; that instead of making the requirement or threatening [86] that plaintiff Donovan's water will be shut off unless he execute an unconscionable or inequitable contract as alleged by plaintiff in connection with lands owned by him in Tract "C," instead of requiring the payment of an unconscionable and inequitable charge, and instead of threatening to render said tract of land worthless, or reduce it to its original desert condition, alleges that water for such of said lands as are being cultivated and irrigated in pursuance of a water rental contract as in this answer earlier described will be furnished to plaintiff in pursuance of the terms of such contract up to December 31, 1917, to wit, for the maturing and harvesting of the crops on said land, and that thereafter as provided in the public notice of April 6, 1917, affecting said land proper water right application is required to be made and filed as a condition precedent to further water service; that is to say, that said plaintiff or for such of his said lands as are covered by said public notice of April 6, 1917, will be required after said date to initiate a water right for the same by way of such water right application, in accord with his covenants and agreements

so to do and in that connection to formally agree to pay a construction cost of $75 per acre of irrigable land, which said requirements and said cost, instead of being wrongful or unlawful, unconscionable or inequitable, are eminently just and proper and directly in accord with law. Defendants deny that plaintiff Donovan in any of the above relations has suffered or can or will suffer any injury, great, irreparable or otherwise. Defendants are without knowledge as to whether the persons for whom defendant Donovan sues, or any of them, own lands in said Tracts B or C, but deny that if any such there are, they [87—47] or any of them are threatened by defendants or either of them, or anyone, with irreparable or any injury. Defendants show the court and allege that as to such of them as are in similar case with plaintiff Donovan, the foregoing denials, admissions and other allegations as to said plaintiff will be directly applicable and should be read by the court in that relation; that instead of being threatened with injury of any kind on account of any requirements that they execute and deliver alleged inequitable and unconscionable contracts or pay an alleged wrongful or inequitable charge, defendants allege that such of said persons as own lands within Tract B are required to do nothing under said public notice of April 6, 1917; but that those in Tract C and covered by said public notice are very properly and lawfully required to file water right applications in pursuance thereof and to formally agree to pay, in installments as provided therein, the designated cost of $75 per acre,

all in accord with their obligations contained in their covenants and agreements, and to thus initiate water rights on said project and pay the cost thereof; that where any of said persons are irrigating their said lands under water rental contracts made prior to April 6, 1917, they will be supplied with water thereunder subject to the terms thereof until December 31, 1917, after which they will be required to make and file such water right applications as conditions precedent to the further delivery of water. [88]

27. As to whether plaintiff Thurman is the owner of the E. ½ SE. ¼ of Section 28, T. 10 S., Range 24 W., G. & S. R. Meridian, or as to whether W. is the successor in interest of Alice Y. Bondesson, defendants, are without knowledge, except that defendants are informed and believe and therefore allege that plaintiff Thurman is the owner of some land within tract covered by public notice of April 6, 1917; as to whether Alice Y. Bondesson in the year 1905, or at any time was the owner of the above-described tract of land, or as to whether she ever became a shareholder or subscriber for stock in the plaintiff corporation and thereby in any manner pledged or mortgaged said tract of land, defendants are without knowledge, except that defendants are informed and believe and therefore allege that the land owned by plaintiff Thurman in Tract C is covered by subscription for stock in plaintiff corporation. However, defendants deny that any such acts by Alice Y. Bondesson, if done, were because of her belief in or reliance upon any determination or estimate by the

Secretary of the Interior, or upon representations or promises of the chief engineer or said supervising engineer, but were done merely in order to insure her land its water supply, in case the Yuma project were built, at such cost as would be designated by the Secretary of the Interior as has now been done in public notice of April 6, 1917. Defendants deny that any determination or estimate for any lands within the so-called Lower Colorado Irrigation District was ever made prior to April 6, 1917. Defendants are without knowledge as to representations or promises by the chief engineer and supervising engineer, but deny that they or any of them [89] if made, were authorized, or that in any event, they could bind or obligate the United States. Defendants allege that such pledging and mortgaging of lands as was done by said Alice Y. Bondesson fully covered the costs of said project as designated in public notice of April 6, 1917. Defendants deny that in the year 1901, or at any time the tract of land described in said complaint or any land that may belong to said plaintiff Thurman, had any water right of any character appurtenant or relating thereto; denies that the Government of the United States through its Secretary of the Interior, director and chief engineer, or otherwise, promised or agreed to supply water to such or any lands for any length of time, or at all. Defendants are informed and believe and therefore allege the truth to be that said Thurman purchased said parcel of land about thirty days after the issuance of public notice of April 6, 1917, announcing the construction charges to be $75

per acre of irrigable land, exclusive of operation and maintenance costs, and that at the time of such purchase of said parcel of land plaintiff Thurman was fully informed and advised of the costs to be assessed against the irrigable land within Yuma project, and that to get water for land which was not furnished with water prior to April 6, 1917 (that being the case as to his land), it was necessary to execute and file with the proper officers of the Reclamation Service a water right applicable under said notice and thus initiate a water right under the Muma project and formally agree to pay his proper share of the cost thereof. As to the amount of land that plaintiff Thurman was placing or has placed in a fit [90] state of cultivation to raise what is known as the summer crop for the year 1917 (by typographical error stated in said complaint as 1907), or as to the expense incurred in that regard or means employed therefor, defendants are without knowledge, except that they are informed and believe and therefore allege that a portion of said above-mentioned tract was at the time of the filing of said complaint partially prepared to be irrigated, and that within a reasonable time thereafter a water supply might be needed in connection with the seeding of said land, but denies that such preparation was undertaken or accomplished because of plaintiff Thurman's belief or reliance upon any promises or representations of the director and chief engineer or anyone (heretofore and now again denied to have been made) as to the supplying of water to said lands or any lands in Tract C; deny that the Government has or had any

legal or moral obligations to supply such water, or that plaintiff Thurman believed in or relied upon the same in the above relation. Defendants are without knowledge as to the losses that would be sustained by plaintiff if he should fail to secure a supply of water for his land or any part thereof, but allege that no such loss could or can possibly occur if he would or will fulfill his own covenants and agreements in the premises, to wit; if he will in accord with the terms and conditions of the public notice of April 6, 1917, apply for, make and file a water right application for such of his lands as are subject to said public notice of April 6, 1917, and thus initiate a water right under the Yuma project, and formally agree to pay, and pay the designated charges of $75 per acre in installments and at the times provided in [91] said public notice. Defendants allege that the Yuma project as to all lands within the so-called Lower Colorado Irrigation District, and as practicable and feasible, has now been completed, and that the determination thereof is prescribed in the said public notice of April 6, 1917.

28. Defendants admit that a system of canals has been so constructed by the Government that a supply of irrigating water for the cultivated portion of the land owned by plaintiff Thurman can be readily, conveniently and economically obtained therefrom; that defendant Schlecht now and for a considerable period prior hereto has had the control and management of said canal system, under the Reclamation Law and regulations and instructions issued thereunder, but allege that defendant Fessenden, although

for sometime as aforesaid connected with said project, has since the latter part of June, 1917, entirely severed his connection therewith and with the Government in that relation, and resides in another State and therefore exercises no such control or management over said canal system. Defendants allege that they have not had and do not have any right or authority to furnish irrigation water to plaintiff Thurman for any portion of his said alleged tract of land from said canal system or otherwise, except in the event that he make and file water right application therefor as in the previous paragraph set forth, and that neither of them has had or has any authority or right to furnish any supply of water to any portion of said tract of land or to accept money in that regard saving only that defendant Schlecht is authorized to accept water right applications for such lands in pursuance of the said public notice of April 6, 1917, and [92—52] to accept through the fiscal agent attached to said project payments upon the charges of $75 per acre set forth in said public notice and formally agreed to in said water right application. Defendants admit that on or about June 30, 1917, plaintiff made demand upon defendants to furnish and deliver from said canal system a sufficient supply of water to irrigate the alleged cultivated portion of said tract of land and tendered money in payment in advance therefor, but denies that the amount then offered was a reasonable, proper, or lawful, charge; admit that defendant Schlecht refused to accept the payment thus offered and refused to furnish and supply any water for the irrigation of said tract

of land or any portion thereof, but allege that that refusal was based upon the neglect and failure of plaintiff to make and file water right application for said land in pursuance of the public notice of April 6, 1917, which plaintiff was then and there advised would have to be made and filed as a condition precedent to the supplying of water, which said water right application (obviously the contract referred to by plaintiffs) instead of being the unconscionable or inequitable contract, which defendants deny, was and is an eminently just and proper instrument required in accord with law, and wherein and whereby plaintiff would initiate a water right for his said lands under the said Yuma project in accord with his covenants and agreements and formally agree to pay the cost of $75 per acre designated for said project in public notice of April 6, 1917, in the installments and at the times prescribed therein; but defendants allege that no installments of such charge in pursuance of said notice and water right application is [93] required to be paid prior to the first day of December succeeding said application, unless the applicant should choose to pay said charges in ten instead of twenty annual installments, in which event the first installment becomes due at the time of filing such application; that in this respect defendants deny that water will not be furnished unless an installment of the said $75 per acre charge be paid instanter, but allege that defendant Schlecht will continue to refuse to deliver and supply irrigating water to plaintiff Ralph Thurman for his said tract of land and to all others similarly situated to

him unless and until he or they make and file water right application in pursuance of said public notice of April 6, 1917. Defendants further allege that the requirements of said public notice and its insistence upon the making and filing of water right application are in entire accord with the Reclamation Law and were made in pursuance of its authority; that defendants have no knowledge of the amount of injury that plaintiff would suffer if water were not delivered to his said land, but allege that he need suffer no injury whatsoever if he fulfills his covenants and agreements and makes and files water right application as aforesaid, and that the temporary injunction issued in this relation should be dissolved. Defendants are without knowledge as to the number of other owners in Tract C in a position similar to Thurman for whom he alleges that he sues, but deny that they or any of them have ever had or now have any vested right to the delivery of irrigating waters to any of their lands, or vested right of any character in that relation, and allege that they and each of them will be required to make and file a [94—54] water right application under the public notice of April 6, 1917, and to be obligated as therein set forth before any supply of irrigating water under the law and said public notice can be delivered for said lands, and that such are the instructions that defendant Schlecht must follow in the administration of said project. Defendants deny that such water right application, evidently the contract referred to by plaintiffs, is in any way inequitable or unconscionable, and alleges that on the contrary it is eminently

just and proper and lawful, and the instrument that said persons and each of them are obligated and bound to execute, make and file under their covenants and agreements.

29. That as to whether plaintiffs Theilmann, Donovan, or Thurman, or any of them, or any of the members of the classes of persons for whom they or any of them sue herein, are able, ready, or willing or anxious to pay reasonable and proper charges for the service or supply of irrigating water for their said lands defendants are without knowledge but defendants allege that in any event the only reasonable and proper charges in the above relation, the ones authorized and promulgated in pursuance of the Reclamation Law, are the charges set forth in the public notice of April 6, 1917, and that it would not only be unlawful for defendant Schlecht, or any other authorized officer of the United States, to accept or receive any other than such charges, but said plaintiffs and each of them and each of the persons for whom they sue, in so far as their lands are covered by the public notice of April 6, 1917, are obligated and bound by their covenants and agreements to make and file water right application [95] thereunder, and that in any event they and each of them, as the case may be after December 31, 1917, or otherwise, will not and should not under the law be supplied with water for their said lands unless and until water right applications initiating a water right and agreeing to pay the designated and proper cost of said project as set forth in the public notice of April 6, 1917, are made and filed for their lands.

30. Defendants deny that they or either of them or any officers of the United States is or has been acting in pursuance or consummation of, or that there is or ever has been, any unlawful or wrongful plan or scheme in relation to the execution or delivery of contracts affecting any lands in Tract C; or that any estimate of cost of $35.28 per acre or of any sum other than $75 per acre was ever made by the Secretary of the Interior or other authorized officer, or that any estimate of cost in that regard was made at all prior to that promulgated in the public notice of April 6, 1917; deny that the control or management of the irrigation system of the Yuma project by them or either of them has been or will ever be unlawfully or wrongfully exercised; and further deny that the charge of $75 per acre set forth in said public notice of April 6, 1917, is unlawful, unconscionable or inequitable, but allege on the contrary that said charge is proper and just and in accord with law, and furthermore has been duly announced and designated by the Secretary of the Interior in said public notice of April 6, 1917. Defendants allege that defendant Schlecht now in charge of said project under the law, as the case may be, presently or after December 31, 1917, is and will be authorized to deliver [96] water from the canals of said Yuma project as prescribed in said public notice of April 6, 1917, only in the event that the owners of lands covered thereby make and file proper water right application therefor under which the applicant shall be formally obligated to pay the said proper cost of $75 per acre at times prescribed

in said notice, that neither he nor any officer of the Government, in accord with the terms of said public notice, has, or will have, any authority to deliver water from the canals of said project in the event of failure or neglect to file such water right applications, though as heretofore set forth in this answer lands covered by water rental contracts prior to April 6, 1917, covered by said public notice will be furnished with water for irrigation, subject to the terms of said contracts, up to and until December 31, 1917. Defendants are without knowledge as to the damage that might accrue to plaintiffs or any of those persons for whom they sue in the event of the failure to have water delivered to their said lands, but allege that no damage of any character need be incurred by anyone in the above relation, or any lands be rendered less productive, if they and each of them will carry out and fulfill their covenants and agreements in the premises, by initiating water rights under the Yuma project by way of the making and filing of water right applications in pursuance of said public notice of April 6, 1917, and thereby formally agree to pay the proper cost of said project as the same is designated and set forth in said public notice, together with the annual charges for maintenance and operation as the same may be announced and designated under the law by the Secretary of the Interior. [97]

31. Defendants deny that they or either of them have or are responsible for any unlawful plan or scheme whatsoever, or that in accord with an unlawful intent, or otherwise, they are attempting to carry

out or consummate any such plan or scheme, but allege that none of the requirements of the public notice of April 6, 1917, including the requirement that water right applications be made in pursuance thereof and the charge of $75 per acre be formally agreed to be paid, in installments and at times set forth in said public notice, and that none of the things that any officers of the United States may be required to do in pursuance of the terms of said public notice, will have the effect of violating any of the terms and conditions of the agreement of May 21, 1906, plaintiffs' Exhibit "C"; and defendants deny that the cost of said project will not be equal throughout the said so-called Lower Colorado Irrigation District, but allege on the contrary, that said cost as now determined and designated, to wit, $75 per acre is and will be equal for said project within and throughout said Irrigation District for the reason that the same applies to all the lands within said district—that it is practicable and feasible to include in said project. Defendants deny that any charges will be or have been unlawfully made payable or will be unlawfully collected prior to the completion of said project, as the charges prescribed in said public notice of April 6, 1917, are proper and lawful, and the lands covered by said notice represent the extent to which it is practicable and feasible to irrigate and reclaim said Lower Colorado Irrigation District. [98—58]

32. Defendants admit that if the plaintiffs or those for whom they sue herein, or either or all of them, have any remedy for the relief herein prayed for, it is such relief as may be granted from the

equity side of this Honorable Court.

33. As to whether plaintiff Thurman at the time of filing of said complaint or at any time prior thereto, or is now ready, to plant a summer crop on his said tract of land, or as to whether he was or is ready, able, or willing to pay the proper and necessary costs and charges for the service of water thereof, or therefor, or as to whether it would have or will be impossible for him to raise any crop unless he could or can procure an immediate or other supply of water, or as to whether in that regard he stood or stands ready to suffer any immediate, or any loss of any character, defendants are without knowledge, but defendants deny that the offer of payment by plaintiffs was in any way consistent with or covered the proper and necessary costs and necessary charges in relation to a water supply of said lands, and allege that the only way and manner in which said plaintiff could or can meet and fulfill his obligations and duties in connection with the water supply of said land, would have been and is that he make and file water right application therefor in pursuance of the said public notice of April 6, 1917, and thus initiate a water right for the same under said Yuma project, and provide for the payment of his proper and lawful share of the costs thereof, to wit, $75 per acre; that he would have avoided and will thus avoid all and every loss, and that if he had made said water right application prior or at the time of filing said complaint, [99] he need not have been concerned as to the occurrence of said loss before a hearing on notice; that

while a temporary supply of irrigating water is now being furnished Thurman and a few others in accord with the order of this Court, the same having been issued on preliminary hearing, defendants respectfully say that such order was made without just cause and should be dissolved, and that plaintiff Thurman and all others, and each of them, for whom a similar order was issued or prayed should forthwith make and file water right application for their said lands in pursuance of said public notice of April 6, 1917. As to whether those for whom plaintiff Thurman sues or any of them was, is able, ready, willing or anxious to pay the proper and necessary charges for their respective tracts of land, or as to the number of them that were or are situated in all respects as is plaintiff Thurman, or had or have their tracts of land ready for irrigation, or as to how many would be unable to raise a crop unless furnished with water, or as to the amount of injury any of them would suffer unless so supplied defendants are without knowledge, but allege that the charges set forth in the public notice of April 6, 1917, and no others were and are the proper and necessary charges in connection with the irrigation of said tracts of land, and that all of said persons and each thereof at the beginning of this suit and since have been and now are obligated to formally agree to pay the same, by way of initiating a water right application under said public notice of April 6, 1917, whereupon they will be forthwith supplied with water for their said lands, and wherefore no emergency of any kind on account of threatened ir-

reparable damage or otherwise, [100] could have heretofore existed or does now exist.

WHEREFORE, defendants having fully answered, pray that they be hence dismissed with their costs in this behalf sustained.

THOMAS A. FLYNN,
United States Attorney.
OLIVER P. MORTON,
District Counsel, USRS.
RICHARD J. COFFEY,
District Counsel, USRS.
Solicitors for Defendants.

State of Arizona,
County of Yuma,—ss.

W. W. Schlecht, being first duly sworn deposes and says, that he is one of the defendants in this cause, and makes this verification for himself and for the defendant Fessenden; that he has read the foregoing answer and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

W. W. SCHLECHT.

Subscribed and sworn to before me this twenty-fourth day of August, 1917.

THOMAS D. MOLLOY,
Notary Public in and for Yuma County, State of Arizona.

My commission expires ——.

Service accepted this twenty-fourth day of August, 1917.

THOMAS D. MOLLOY,
FRED L. INGRAHAM,
BAKER & BAKER,
Solicitors for Plaintiffs. [101]

[Endorsement on Answer]: Filed Aug. 25, 1917. Mose Drachman, Clerk. By Nat. T. McKee, Deputy Clerk. [102]

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In the United States District Court for the District of Arizona.

E—59, PHOENIX.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, JOHN A. DONOVAN, and RALPH THURMAN.
Plaintiffs,

vs.

W. W. SCHLECHT and R. S. FESSENDEN,
Defendants.

**Stipulation.**

It is hereby stipulated and agreed by and between the plaintiffs and defendants above named that the answer of defendants to the complaint on file herein be and the same is hereby amended so as to read as follows:

(1) Page 28, line 29—substitute "as" for "that."

(2) Page 29, line 29—introduce the word "that" before said.

(3) Page 30, line 3—cross out the word "not."

(4) Page 36, line 4—put semi-colon after the word "state" and begin next word with small letter.

(5) Page 41, line 11—substitute "designated" for the word "required."

(6) Page 41, line 20—substitute "plaintiff" for the word "defendant."

(7) Page 44, line 27—introduce "and is" before the word "obligated."

(8) Page 47, line 17—cross out the word "or."

(9) Page 52, line 4—substitute "delimitation" for the word "determination."

(10) Page 54, line 9—introduce "except as otherwise ordered by this court and reserving his lawful remedies" after "Schlecht."

(11) Page 58, line 22—omit dash (—).

THOS. D. MOLLOY,
FRED L. INGRAHAM,
BAKER & BAKER,
Solicitors for the Complainants.

THOMAS A. FLYNN.
OLIVER P. MORTON,
RICHARD J. COFFEY,
Solicitors for the Defendants. [103]

In the United States District Court for the District of Arizona.

E—59, PHOENIX.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, JOHN A. DONOVAN, and RALPH THURMAN.
Plaintiffs,

vs.

W. W. SCHLECHT and R. S. FESSENDEN,
Defendants.

**Affidavit.**

State of Arizona,
County of Yuma,—ss.

W. W. Schlecht, being first duly sworn, deposes and says, that the foregoing stipulation entered into by and between solicitors for plaintiffs and defendants in the above-entitled cause is for the purpose of correcting certain errors of a typographical nature contained in the answer to the complaint now on file herein, and affiant further deposes and says that said answer would have been verified in like manner and form had said corrections been made prior to his verification thereof.

W. W. SCHLECHT.

Subscribed and sworn to before me this 13th day of Sept., 1917.

[Seal] THOS. D. MOLLOY,
Notary Public in and for Yuma County, State of Arizona.
My commission expires 6/21/19.

[Endorsement]: Filed Sept. 17, 1917. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [104]

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In the United States District Court for the District of Arizona.

(E—74. TUCSON.)

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT et al.,

Defendants.

**Stipulation—Answer to Amended Complaint.**

It is hereby stipulated between the parties hereto that the answer filed by defendants to the original complaint herein shall be deemed and held to be, and have force and effect as, an answer to the amended complaint herein and the amendments thereto allowed and filed as of April 28, 1919, as far as the same may be applicable, and said amended complaint and said amendments correspond with said original complaint, and that this shall be true as to each and every separate defense made in said answer; that in all respects where said amended complaint or amendments modifies or makes additions to said original complaint every material allegation therein shall be deemed and held to have been put in issue by defendants as well as if an answer or supplemental answer, duly verified, had

been filed by defendants; and that testimony, evidence and proof may be adduced and submitted by defendants, subject to objection as to its materiality, relevancy or competency, to the same effect and purpose as though an answer to said amended complaint and amendments, specifically meeting the aforesaid material allegations of said amended complaint and amendments, as provided in Equity Rules Nos. 30 and 32, had been filed and served upon plaintiffs, and that the trial in all regards [105] shall proceed as though such answer had been made.

Dated; April 28, 1919.

THOS. D. MOLLOY,
Solicitor for Plaintiff.
THOS. A. FLYNN,
OLIVER P. MORTON,
Solicitors for Defendant.

[Endorsements]: Filed this 25 day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [106]

In the United States District Court for the District of Arizona.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THIELMANN, JOHN A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECT and DAVID C. CAYLOR,

Defendants.

**Plaintiffs' Motion for Leave to File Supplemental Pleading.**

To the Honorable W. H. SAWTELLE, Judge of said Court:

Plaintiffs pray and petition the Court that they may be permitted to file a supplemental pleading herein, setting up and bringing to the attention of the Court, certain facts which have occurred subsequent to the commencement of this suit, to wit:

That in the summer of the year 1917, and subsequent to the commencement of this suit, the Secretary of the Interior caused certain orders to be made, exemplified copies of which have been offered as evidence in this cause by the defendants, purporting to declare and determine that the Yuma project, as described in the complaint, was finished and completed; and that in the year 1918, and subsequent to the commencement of this suit, the Secretary of the Interior, acting for and on behalf of

the United States of America, duly entered into a contract in writing with Imperial Irrigation District, a California municipal corporation, whereby the said municipal corporation promised and agreed to pay to the United States of America, the sum of one million six hundred thousand dollars, for the privilege and right of taking, and using water from the Lagoona Dam of the said Yuma project by said municipal corporation; and the Secretary of the Interior thereupon promised and agreed that said sum of money would be credited, in certain proportions, to the land owners within the Yuma project, on the [107] amounts declared to be due by them under the public notice of April 9, 1917, and a copy of said amended pleading is annexed hereto.

And plaintiffs shall ever pray.

THOS. D. MOLLOY,
Solicitor for Plaintiffs. [108]

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In the United States District Court for the District of Arizona.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THIELMANN, JOHN A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECT and DAVID C. CAYLOR,

Defendants.

**Supplemental Pleading.**

Plaintiffs complain, and allege, and respectfully show the Court that, as plaintiffs are informed and believe, since the commencement of this suit and in the summer of 1917, the Secretary of the Interior did make certain orders whereby he purported to declare and determine that the Yuma project of Reclamation Service as embraced with the Lower Colorado Irrigation District, as described in the complaint, was then and there completed and finished, notwithstanding that certain portions thereof, to wit, Tracts A and B, as set forth, described and delineated in the complaint, had not been in any manner physically reclaimed, as more particularly set forth in said complaint, and notwithstanding that the drainage system of Tract C, as described in the complaint, had not been completed; that as plaintiffs are informed and believe, the said orders so made by the Secretary of the Interior, were made for the purpose of affecting the ultimate adjudication of this suit, and were made by the Secretary of the Interior without due and proper investigation, and without jurisdiction, for the reason that the Secretary of the Interior had, many times from the year 1904 until the end of the year 1916, declared and determined that said portions of the Yuma project were feasible, practical and advisable, and in truth and in fact, that portions of said project were at the time of making of said orders, and each of them, [109] feasible, practical and advisable of construction as originally planned and determined

by the Secretary of the Interior, in the year 1904; and the Secretary of the Interior was not, in the summer of the year, 1917, in possession of any facts or information that would justify the making of said orders, or either of them; and that the making of said orders was without the jurisdiction of the Secretary of the Interior, and in violation of the letter and spirit of the contract entered into between plaintiff corporation and the United States of America, on May 31, 1906, a copy of which is annexed to the complaint herein as an exhibit, and the said orders, and the making thereof, was and is an abuse of any and all discretion vested in the Secretary of the Interior by law, or at all; and it would be inequitable and unjust to permit the defendants in this case to deprive the plaintiffs herein of the use of irrigating water in the manner described in the complaint, or at all, because of the making of said orders.

II.

That, as plaintiffs are informed and believe, in the year 1918, and subsequent to the commencement of this suit, the Secretary of the Interior, acting for and in behalf of the United States of America, entered into a certain written agreement with Imperial Irrigation District, a municipal corporation of the State of California, whereby the said municipal corporation promised and agreed to pay to the United States of America, the sum of one million six hundred thousand dollars, for certain rights and privileges in the use of and taking of water from the Lagoona Dam of the Yuma project of the United

States Reclamation Service, whereupon, the Secretary of the Interior, acting for and on behalf of the United States of America, promised and agreed to and with the plaintiff corporation, acting through and by its duly authorized representative, one Mulford Winsor, that said sum of one million six hundred thousand dollars, so agreed to be paid by said Imperial Irrigation District to the United States of America, should be, and would be, credited to the land owners within Tract C of the Yuma project, otherwise the Lower Yuma Valley, as described in the complaint, upon [110] the amounts declared to be due upon their lands for the cost and expense of said Yuma project, in the same proportion as the cost of the Lagoona Dam of said project had been prorated upon the lands of the said land owners; for which reason it would be unjust and inequitable to permit the defendants in this suit to deprive the plaintiffs of the use of irrigating water in the manner described in the complaint, or at all.

WHEREFORE, plaintiffs pray that they have the relief prayed for in the complaint filed herein.

THOS. D. MOLLOY,
Solicitor for Plaintiffs. [111]

State of Arizona,
County of Pima,—ss.

Andrew Y. Greer, being first duly sworn, deposes says that he is president of the plaintiff corporation, and makes this affidavit for and on its behalf and on behalf of all the other plaintiffs; that he has read the foregoing supplemental pleading, and

knows the contents thereof; that the same is true in substance and in fact, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

ANDREW Y. GREER,

Subscribed and sworn to before me this 2d day of May, 1919.

MOSE DRACHMAN,
Clerk of said Court.

[Endorsements]: Yuma Co. Water Users' Association et al., Plaintiffs, vs. W. W Schlect and David C. Caylor, Defendants. Supplemental Pleading. Filed May 2, 1919. Mose Drachman, Clerk. [112]

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In the District Court of the United States, District of Arizona.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, RALPH THURMAN and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECT and DAVID C. CAYLOR,

Defendants.

**Statement of the Evidence and Oral Proceedings.**

This case came on for trial on April 28, 1919, before Honorable Wm. H. Sawtelle, Judge, Thomas D. Molloy appearing as attorney for plaintiffs, and W. R. King, O. P. Morton, Richard J. Coffey

and Thomas A. Flynn, Esquires, appearing as attorneys for defendants. Thereupon, the first two defenses set up in the answer of the defendants, designated "A" and "B," to wit: a plea to the jurisdiction, and motion to dismiss, with the approval of the Court, were submitted without argument, and overruled and denied; to which rulings of the Court the defendants thereupon duly excepted.

Thereupon the plaintiffs were permitted to amend their complaint in accordance with their petition therefor filed on this day.

Plaintiffs introduced in evidence without objection, as their exhibit No. 1, the articles of incorporation of the corporate plaintiff Yuma County Water Users' Association, which are in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 1.**

ARTICLES OF INCORPORATION OF THE YUMA COUNTY WATER USERS' ASSOCIATION.

Know All Men by these Articles of Incorporation:

That we, the undersigned, have associated ourselves together under the laws of the Territory of Arizona as a body corporate.

ARTICLE I.

The name of the corporation shall be and is Yuma County Water Users' Association.

ARTICLE II.

The names of the incorporators are: S. E. Beach,

O. P. Bondesson and nineteen others. But others may become members of said Association by subscribing to these Articles of Incorporation, or a copy thereof, or by the transfer of stock to them in the regular course of the administration of the affairs of the Association. [113]

ARTICLE III.

The principal place of transacting the business of the Association shall be at Yuma, in the County of Yuma, in the Territory of Arizona.

ARTICLE IV.

Section 1. The objects for which the Association is organized and the general nature of the business to be transacted by it shall be and are:

To provide for and distribute and furnish to the lands of the holders of shares of said Association to which said shares and the rights and interests represented thereby are appurtenant, an adequate supply of water for the irrigation of said lands;

To divert water within the Territory of Arizona from the public sources of water supply, to impound water and develop sources of water, to pump water from underground sources, to carry and distribute water for the irrigation of the lands aforesaid, and to construct, purchase, lease, condemn or otherwise in any way whatsoever acquire and own, hold, have, use, control, maintain, preserve, manage, operate and conduct the means therefor and any and all rights, reservoirs, dams, canals, ditches, flumes, headgates, pipes, machinery, wells, pumps, pumping plants, power houses, transmission lines, levees, dikes, and other works necessary for pro-

tecting lands from overflow, and property both real and personal of every nature and kind whatsoever necessary or appropriate for the accomplishment of any of the objects or purposes aforesaid;

To divert, impound, develop, pump, distribute, deliver and use water for all beneficial uses and purposes from surface and subterranean sources by any means adapted to any of the purposes aforesaid, and create, transmit and use power for the accomplishment of any of the purposes or objects of the Association as hereinbefore set forth;

To develop, manufacture, generate, or otherwise create, and to sell, use, and lease, water power and other power, and transmit, carry and conduct the same;

To have and exercise all the powers, and do all and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes, or the attainment of any one or more of the objects herein enumerated, or incidental to the powers herein named, or which shall at any time appear conducive or expedient for the protection or benefit of the Association or its members as shareholders therein.

Section 2. For the accomplishment, or to aid in and promote the accomplishment, of the aforesaid purposes or objects, or any of them, this Association shall have power to enter into any contract or other arrangement, or undertake in whatsoever manner and by whatsoever means may be deemed proper or convenient therefor, to secure action by or the aid of the United States Government in the

construction, erection or acquisition of any dams, reservoirs, canals, wells, or other works or property, or appurtenances necessary thereunto, for storage, development, diversion, distribution or delivery of water to lands of shareholders of this Association, or to aid therein, and to enter into any agreement with said Government which may be approved by the Secretary of the Interior or any duly authorized official or representatives of the Government with reference to the collection and payment to the Government of any and all moneys which may be due the Government under or by reason of rights issued by the Government to members of this Association for the use of water from any reservoir or irrigation works acquired or constructed by said Government, or in the acquisition or construction of which it may have aided, and to comply with any conditions, rules or regulations prescribed by Congress or by any [114] executive department or official of said Government lawfully authorized thereunto, concerning the storage diversion, delivery, application, or use of any water so stored, developed or delivered to the shareholders of this Association from or by means of any works constructed or acquired by the Government or in the construction or acquisition of which the Government may have aided, or which it may hereafter construct or acquire, or in the construction or acquisition of which it may hereafter aid.

Section 3. The territory within which are the lands to be irrigated as aforesaid shall be known as the Lower Colorado Irrigation District; and shall

include lands within the boundaries described as follows, that is to say:

Commencing at the point where the Gila River converges with the Colorado River, thence up the Gila River to a point directly north of Blaisdell station on the Southern Pacific Railway, thence to said Blaisdell station, thence westerly along the edge of the Mesa to the south line of the town of Yuma, thence westerly along said line to the edge of the Mesa, thence southwesterly along the edge of the Mesa to the northern boundary of Mexico, thence westerly along said boundary to the Colorado River, thence up said river to the point of beginning; together with any public or other lands on which rights to the use of water from reservoir or irrigation works referred to in Section 2 of this Article shall be issued by the Secretary of the Interior.

## ARTICLE V.

Section 1. The capital stock of the Association shall be $7,500,000, and be divided into 500,000 shares of the par value of $15.00 per share.

Section 2. Those and only those who are owners of lands or occupants of public lands having initiated a right to acquire the same, within the territory described in Article IV of these Articles of Incorporation, or within such extensions thereof as may be hereafter made from time to time under the powers herein conferred for that purpose, shall be the holders or owners of shares of the capital stock of this Association. For each acre of such lands

shareholders may become the owner of one share of stock of this Association and no more.

Section 3. As a condition of continued ownership of said shares of stock, and participation in any of the benefits thereof, each subscriber therefor, or transferee thereof in case of transfer shall, as soon as the right or rights hereinafter referred to become subject to application and acquisition under the rules and regulations prescribed or to be prescribed for the purpose by Congress or any executive department of the Government, apply for, and in good faith comply promptly with all such rules and regulations for the acquisition of a right to the use of water from any source of supply provided by the Government, or in the provision of which the Government has aided, for the irrigation of the lands to which said shares and rights represented thereby are appurtenant. Upon the failure of the subscriber, or holder otherwise of any of the shares of the capital stock of this Association to apply for such rights, or, having applied therefor, upon failure to promptly and in good faith comply with all rules and regulations prescribed or that may be prescribed by Congress or by any executive department of the Government relative thereto, then he shall forfeit to the Association such shares of stock and all and every right in anywise theretofore or then incident thereto, or that might in any way arise or accrue from or exist by virtue of such subscription or ownership, or that could by any means arise or be claimed therefrom, and such person, his heirs and assigns, shall thereafter have no

right whatsoever as a member of this Association by virtue thereof.

Section 4. Any shares of stock so forfeited shall at once be cancelled and shall not again under any circumstances, be renewed, revived, or reissued. Other stock in lieu thereof up to the limit of the total number of shares authorized by these Articles [115] may be subscribed for, and issued, subject to all the conditions of these Articles and to the approval of the Secretary of the Interior.

Section 5. The ownership of each share of stock of this Association shall carry, as incident thereto, a right to have delivered to the owner thereof water, by the Association, for the irrigation of the lands to which such share is appurtenant.

Section 6. The amount of water so to be delivered to such owner shall be that proportionate part of all stored and developed water, the storage or development of which is or may be affected by this Association, or by means of works under its control, management or direction or which may become available for distribution by this Association from irrigation works built by *by* the National Government, during any irrigating season, as the number of shares owned by him shall bear to the whole number of valid and subsisting shares of the Association issued and then outstanding, to be delivered to and upon said lands at such times during such season as he may direct.

Section 7. And there shall also be incident to such ownership of such shares the right to have delivered to the owner thereof, for the irrigation of

said lands, as the Association shall from time to time acquire means for that purpose, the water heretofore and before the shareholder or his transferee became a member of this Association, appropriated by him or by his predecessors in interest, for the irrigation of said lands; provided however, that the whole amount of water actually delivered from all sources shall not exceed the amount necessary for the proper cultivation of said lands.

Section 8. The records of the Association and each and every certificate or other evidence of ownership of shares of stock in the Association, when issued, shall contain a description of the lands to be irrigated, and to which the aforesaid rights and shares shall be perpetually appurtenant, and thereafter all rights, whatever their source or whatever their manner of acquisition, to the use of water for the irrigation of said lands, shall forever be inseparably appurtenant to said lands, together with the said shares of stock, and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of these Articles of Incorporation or of by-laws adopted in pursuance thereof, or by operation of law, or by the voluntary abandonment thereof by deed, grant or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by such shareholder, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandon-

ment of whatever kind of such right, provided, however, that if for any reason, it should at any time become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the same is appurtenant on the said land, the said right may be severed from said land and simultaneously transferred and attached to other lands by which shares of stock in this Association are or are thereby made appurtenant, if a petition for leave to make such transfer and showing the necessity therefor shall have first been approved by a two-thirds vote of the Board of Governors at a regular meeting and by the Secretary of the Interior; and all the provisions and agreement hereinbefore in this section contained shall be set forth in the aforesaid certificate or other evidence of the ownership of shares of stock in this Association, and such certificate or other instrument shall be signed, executed and acknowledged by the President and secretary of the Association and by the person to whom it is issued in the manner required by law for the execution and acknowledgment of deeds for the conveyance of real estate, and the Council shall pass by-laws prescribing the form of such certificate or other instrument not inconsistent with these articles. [116]

Section 9. Every transfer of the title to any lands to which the said rights and stock are so appurtenant, whether by grant or by operation of law (except where the land may be subjected by grant or involuntarily under any law to an easement, the exercise of which does not interfere with

the cultivation of the soil by the servient owner) shall operate, whether it be so expressed in the grant or other means of transfer or not as a transfer of all rights to the use of water for the irrigation of said lands, and all rights arising from or incident to the ownership of such stock, and as well the stock itself, to the grantee or successor in title of said lands; and upon presentation to this Association of proof of any such transfer of land, to which such rights are appurtenant, the proper officer shall transfer such stock upon its books to the successor in title to said lands.

Section 10. Any transfer, or attempted transfer, of any of the shares of stock of this Association, made or suffered by the owner, thereof, unless simultaneously a transfer of the land to which it is appurtenant is made or suffered, shall be of no force or effect whatsoever for any purpose, and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

Section 11. No payments for the capital stock of this Association shall be required except in the manner following:

Whenever it shall be announced or otherwise made known by the Government, or any of its proper agencies, to the subscribers to the shares of said capital stock that rights may be initiated to the use of water from any works acquired or constructed by it for the storage or development of water capable of being used on the lands of the subscribers for said shares of stock, or in the ac-

quisition or construction of which works the Government shall have aided, then the said subscribers shall, under the rules and regulations prescribed by the Government therefor, within a reasonable time, apply to the proper agency for such rights at the rate of one acre for each share of stock so subscribed for, and upon proper proof to this Association that such rights have been allotted to the subscriber and that he has complied with the Government rules and regulations up to that time, so as to entitle him to complete his ultimate acquisition thereof, then such subscriber shall be deemed to have paid on the subscription of said stock the amount that he shall have then paid to or for the use of the Government for such right and when all subsequent payments required by the Government for such rights shall have been paid by him, or by anyone for him, then such stock shall be deemed and held to have been fully paid up.

Section 12. If it should be determined by the Government that the amount of water that may safely be estimated to be capable of being stored, or developed by works acquired or constructed or to be acquired or constructed by it, or by this Association, in addition to the amount of water now appropriated out of the Colorado River, for the irrigation of lands in said Irrigation District, shall together be insufficient to properly irrigate 500,000 acres of land, then the number of shares of the capital stock of this Association shall be reduced so that the number of such shares shall not exceed the number of acres estimated by the Government

to be capable of irrigation from such combined sources of supply.

Section 13. If at the time of the determination by the Government of the number of acres capable of such irrigation, there shall have been subscribed for a number of the shares equal to the number of acres so estimated to be capable of irrigation, then no subscription for more shares shall be taken, if the number so subscribed for, however, shall then exceed the estimated number of acres so capable of irrigation, then there shall be allotted to said subscribers that number of shares equal to the estimated number of acres capable of irrigation. In such allotment, cultivated lands shall have the preference; and any excess in the number of shares subscribed for over the number so allotted, shall be cancelled, and thereafter shall not be issued. [117]

Section 14. In exercising the right of preference to allotment of shares, provided for in the foregoing section, the by-laws may prescribe reasonable times within which such preference shall be declared and the manner thereof.

## ARTICLE VI.

Section 1. The exercise of the corporate powers of this Association and the management of its affairs shall be vested in

1. A Council.
2. A Board of Governors.
3. One or more local boards of Water Commissioners, and
4. A President, Vice-president, Treasurer, Secretary and such other officers and agents as shall

or may be, from time to time, created and established by the Council.

Sections 2 to 15 provide for the formation of the Council, as the legislative body of the organization.

ARTICLE VII.

Provides for Elections by shareholders.

ARTICLE VIII.

Section 1. The Board of Governors shall consist of the President by virtue of his office, and one member elected from each precinct. Each of said elected members shall be the owner of lands situated within the precinct for which he is elected, to which shares of stock of this Association are appurtenant, and shall also be a resident of the Irrigation District; and if he should, during his term of office, cease to be such owner or a resident of such Irrigation District, his office shall thereupon, and by reason thereof become vacant.

Sections 2 to 7, inclusive, provide for the election of Directors.

Section 8. The Board of Governors shall have the administration of the corporate affairs and business of the Association and shall manage and conduct the same subject to all the provisions of these Articles and of the by-laws.

Section 9. It shall have the power to appoint, subject to removal by it at any time, a General Superintendent, and prescribe his duties and powers, subject to all rules and regulations prescribed by the by-laws and to employ an engineer, or engineers, and such other employees as may be proper and necessary to effect the purposes of this

Association, subject to such rules and regulations as may be prescribed by the by-laws.

Section 10. It shall have the power to prosecute, defend, and compromise all lawsuits; to make all contracts, in the name of the Association, necessary and proper for the conduct of the affairs and the carrying on of the business of the Association, subject to all limitations and regulations prescribed by these Articles of the by-laws.

Section 11. It shall have the power to estimate, make and levy all assessments against shareholders of the Association, to the extent and in the manner authorized by these Articles and regulated and prescribed by the by-laws.

Section 12. It shall have the power to make, publish and enforce rules and regulations concerning the distribution, use and application of water for irrigation, subject at all times to, and not inconsistent with, these Articles, or with the by-laws, or with any rules or regulations established by the Secretary of the Interior or other agency of the National Government.

Section 13. It shall keep, or cause to be kept, a record of its transactions, which shall at all times remain in the office of the Association and shall, during office hours, be open to the inspection of the shareholders, or their properly authorized agents. [118]

Section 14. It shall hear and determine complaints of shareholders of non-service, or of improper service or distribution of water, or of im-

proper performance of duty by any employee of the Association relative to the distribution of water.

ARTICLES IX.

IS FURTHER Provisions for internal organization not involved in this suit.

ARTICLES X.

SAME as Article VIII.

ARTICLE XI.

SAME as Article IX.

ARTICLE XII.

Upon proper complaint thereof by the Board of Governors duly sustained, the Council may remove from office, the President Vice-President, Treasurer, Secretary, or the incumbent of any office created by the Council, for incompetence, neglect of duty, misappropriation of funds of the Association or for violation of any of the provisions of these articles or of any by-law. The Council shall prescribe by-laws the procedure for such removal.

ARTICLE XIII.

Sections 1 to 3 inclusive provide for levying and collection of Assessments.

Section 4. Assessments for the purpose of constructing or acquiring, or for the betterment, improvement, renewal, replacement or preservation of any works, property or rights of the Association or for the purpose of preserving or increasing or more efficiently or economically distributing the water supplies available for distributing by the Association, or for the fulfillment of any obligation under-

taken by the Association in any contract, agreement or other arrangement with the United States government, or necessary for the accomplishment or carrying out of any of the purposes of the Association may be equally assessed against all shareholders in proportion to the number of shares owned by them respectively.

Section 5. Provides for special assessment.

Section 6. Assessments shall become, from time to time as they are made and levied, and, until they are paid or otherwise discharged, shall be and remain a lien on the lands of the shareholder against which they are levied, and upon the shares of stock appurtenant to said lands, and all rights *an* interests represented by such shares. The manner of fixing the lien and enforcing the same shall be prescribed in the by-laws.

Sections 7 and 8 DEAL WITH ASSESSMENTS and Bonds.

ARTICLE XIV.

Nothing in these Articles of Incorporation, or in the fact of becoming a member of this Association, shall be construed as affecting, or intending to affect, or in any way interfere with the present vested rights of any person to the prior use or delivery of the natural appropriated flow of the waters of the Colorado River.

ARTICLE XV.

The individual property of the shareholders shall be exempt from liability for incorporate indebtedness of this Association. [119]

ARTICLE XVI.

The incorporate indebtedness shall not exceed two-thirds of the amount of the capital stock.

ARTICLE XVII.

This corporation shall commence when these articles are filed for record with the County Recorder of Yuma County and shall endure for the term of twenty-five (25) years.

ARTICLE XVIII.

These Articles of Incorporation can only be amended by the shareholders at a regular annual election or at a special election called for that purpose. No proposed amendment shall be submitted to the shareholders until it shall have first received the approval of two-thirds of the members of the council at a regular or duly called session thereof, nor shall any such proposed amendment be so submitted until it shall have been published in full at least once in each week for four consecutive weeks in at least one newspaper published and of general circulation within the territory described in Article IV, of these articles, the last of which such publications shall be not less than 10 nor more than 20 days before any such election.

ARTICLE XIX.

This Association may accept and avail itself of or subject itself to the provisions of any law or laws enacted or that may be enacted by Congress or the legislative assembly of the territory or state when it becomes a state, of Arizona, relative to corporations, which may be applicable to corporations or-

ganized for like purposes as this Association. Such acceptance or subjection shall be valid when ratified by at least two-thirds of the votes cast at any annual election or at any special election called for the ratification thereof.

ARTICLE XX.

The seal of this Association shall be a figure of two concentric circles, the outer being 2 inches and the inner 1½ inches in diameter. In the space between the two shall be the words, "Yuma County Water Users' Association," and bearing within the center space an unrolled scroll with the words and figures thereon: "Incorporated, 1903, Arizona."

WITNESS our hands hereunto, this 2nd day of November, A. D. 1903.

S. E. BEACH,
O. P. BONDESSON and
19 others.

(Duly acknowledged by all incorporators.)

Duly certified by H. L. Beltzhoover, Secretary of Yuma County Water Users' Association, as a true copy of the Articles of Incorporation of said Association; also duly certified by the County Recorder of Yuma County, State of Arizona, as being a copy of an instrument recorded in his office in Book 1, Articles of Incorporation, page 325 et seq., on May 3, 1903.

AMENDMENTS TO THE ARTICLES OF INCORPORATION OF THE YUMA COUNTY WATER USERS' ASSOCIATION:

At a special election of the shareholders of the

Yuma County Water Users' Association, held on May, the 5th, A. D., 1906, the following five amendments to the Articles of Incorporation of the said Association were duly adopted and ratified, said amendments having been theretofore duly proposed by a two-thirds vote of the Council of the said Association; and said [120] five amendments thereupon became a part of the articles of Incorporation of the said Association, said amendments being in words as follows, to wit:

ARTICLE I.

Section 2 of Article VI, of Articles of Incorporation is hereby amended to read as follows: The Council shall consist of members elected annually, two from each precinct, who shall hold their offices for one year. In the event of a vacancy occurring, from death, resignation, ceasing to be a shareholder of this Association, removal from the Irrigation District, or other case, the unexpired term shall be filled by the Council; provided—That the person chosen to fill the unexpired term shall have the qualifications necessary for a Councilman, for the precinct in which the vacancy occurs. Shareholders of this Association only shall be eligible to the office of member of the Council. A majority of the members of the Council shall constitute a quorum.

ARTICLE II.

Section 2 of Article VIII, is hereby amended to read as follows: One member of said Board shall be elected at the annual election to be held on the first Tuesday of December, 1904, and at each an-

nual election thereafter, from and by the electors of each of the precincts into which the territory described in Article IV, of these Articles is or may be divided, for the purpose of the election of members to the Council.

ARTICLE III.

Section 3 of Article XIII, is hereby amended by inserting the word "of" after the word "cost" and before the word "operation" that the said section may read: Assessments for the ordinary cost of operation, maintenance and repair of the works of the Association, etc., etc.

ARTICLE IV.

To the Irrigation District, as described in Section 3 of Article IV shall be added the lands bounded as follows: Beginning at the intersection of the center lines of the Colorado and Gila rivers; thence up the center of the Gila river to the intersection of the river with the line between Sections 17 and 18, T. 8 S. R. 21 W., G. & S. R. M.; thence due north to the N. E. corner of Section 7 of said township and range; thence due west to the quarter corner common to Sections 2 and 11, T. 8 S., R. 22 W.; thence due north to the quarter corner common to Sections 14 and 23, T. 7 S., R. 22 W.; thence due west to the center of the Colorado river; thence in a southerly direction down the center of the Colorado river to the point and place of beginning.

ARTICLE V.

The term of President and Vice-President is hereby changed to one year, to take effect January

1, 1907, and hereafter, at each annual election, a President and Vice-President shall be elected.

IN WITNESS WHEREOF the Association has caused this certificate to be signed by its President and Secretary and its corporate seal to be affixed, at Yuma, Arizona, this 23d day of May, A. D. 1906.

M. WINSOR, Sr.,
President.

[Seal] Attest: P. J. MILLER,
Secretary.

(Duly acknowledged before Fred L. Ingraham, Notary Public.)

Duly certified by the Secretary of the Association to be a true copy of the amendments to the Articles of Incorporation of the Yuma County Water Users' Association.

Duly certified by the County Recorder of Yuma County, Arizona, as an instrument duly recorded in Book 2, Articles of Incorporation, page 215, in his office on May 25, 1906. [121]

Mr. MOLLOY.—As Exhibit 2 we offer a duly exemplified copy from the office of the United States Reclamation Service of Washington, D. C. of what purports to be a certain estimate in connection with the Yuma project, made by a certain board of consulting engineers on April the 8th, 1904; the board consisting of A. P. Davis, B. M. Hall, H. N. Savage, W. H. Sanders, C. Y. Wisner and J. H. Quinton, purporting to accompany a letter or report from that board to the chief engineer dated April the 8th, 1904.

Mr. MORTON.—The objections that will be made to the introduction to this and other testimony that

Mr. Malloy will, I have no doubt, introduce right in this connection involve a comprehensive question, and I am just wondering as to the order in which we might discuss it. It is my understanding, Mr. Molloy, that you expect to introduce an alleged public notice.

Mr. MOLLOY.—Yes, and also partly sustained or attempted to be sustained by oral testimony.

Mr. MORTON.—It occurs to me that these matters might be offered in evidence, a number of them together, and then an argument made upon the objections at one time rather than to make them separately. This document, for example, would be subject to a portion of the objections made in the argument, and the other documents that would be submitted would dovetail into the argument in such a way as to make it a probably more advisable thing to discuss it in one bite, as the saying goes, rather than argue for this and then argue for another. If the court and counsel will agree I would like to have this offered and the others offered together and then objections made at one place as to the law.

The COURT.—You gentlemen may take your own course. It is immaterial to me. I am perfectly willing to accommodate you.

Mr. MORTON.—I will add, of course, that the objections will in general form be that they are incompetent, [122] irrelevant and immaterial.

The COURT.—Then it is the desire of counsel that I withhold my rulings as to these several documents?

Mr. MORTON.—That is the suggestion.

Mr. MALLOY.—In which we acquiesce, if the Court please.

The COURT.—It is offered and may be marked for identification, to wit:

**Plaintiffs' Exhibit No. 2.**

Exhibit I. Yuma Project. Estimate March 1904.

(This accompanied letter dated Apl. 8, 1904, per consulting engineers.)

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## BASIS OF ESTIMATE.

### Low Level Canal Line.

Laguna Weir—Map on scale 100′ to 1″ and soundings.

Dam Site #3 weir—Map on scale 100′ to 1″ and soundings.

California Canal—Map on scale 100′ to 1″.

Arizona Canal—Map on scale 100′ to 1″ to Yuma and various angle line surveys. Below Yuma single line surveys only.

Gila Crossing—Map on scale 100′ to 1″ and soundings.

Levee California Side—Preliminary location surveys and cross-sections and observation of high water marks.

Levee Arizona Side—Preliminary location surveys and cross-sections and observations of high water marks.

Levee Gila—Preliminary location surveys and cross-sections and observations of high water marks.

Pumping Plants (Estimate by Mr. Storrs ) based on levels for heads and 50% of irrigation water, seepage water to be lifted over levee during floods.

Drainage System—Only a rough estimate based upon maps on scale of 2″ to 1 mile.

High Level Canal Line.

The exploration for bed rock along the Colorado River has been unfavorable, at the Yuma Dam Site, at Picacho, and at Bill Williams. The fact that high dams could not be built, in addition to the extreme roughness of the Mesa side hill, where the High Line Cnaal would be constructed, makes it practically impossible to put a high line canal on the Mesa. Extended surveys have been made to reach this territory, but the estimate therefor is not completed and the enterprise is not considered feasible.

The field work for this estimate has been performed under the direction of Mr. E. T. Perkins, engineer of all Colorado River surveys—Mr. J. C. Clausen, as engineer in charge of field location parties—Mr. Homer Hamlin, as engineer has prepared most of the plans and estimates—Mr. J. B. Lippincott, Supervising Engineer, has been through all the engineering features of the plans and field work, and has prepared estimates in connection with Mr. Hamlin and Mr. Perkins, and all are personally familiar and responsible for both the design and costs.

## AREAS OF IRRIGATION DISTRICTS.

| | | |
|---|---|---|
| | | All Inside of Levees. |
| California District No. 1— | | 6,400 acres. |
| " " No. 2— | | 6,600 " |
| " " No. 3 | | 3,000 " |
| | Total..... | 16,000 |
| Arizona District No. 1— | 3,380 acres. | |
| " " No. 2— | 6,172 " | |
| " " No. 3— | 3,136 " | Under pump. |
| " " No. 4— | 4,990 " | Under pump. |
| " " No. 5— | 3,570 " | |
| " " No. 6— | 3,000 " | Under pump. |
| " " No. 7— | 10,350 " | |
| " " No. 8— | 15,820 " | |
| " " No. 9— | 14,947 " | |
| " " No. 10— | 14,834 " | |
| " " No. 11— | 10,000 " | Considered as swamp and overflow. |
| Total..... | 90,199 " | [124] |
| Area North of Laguna Dam Site, | 2,625 | —Not available if Laguna Weir is built. |
| Total California ..... | 16,000 acres. | |
| Total Arizona ..... | 90,199 " | |
| Grand Total..... | | 106,199 |
| Not available for irrigation | | |
| District No. 11—overflow..... | 10,000 acres. | |
| 20% of Remainder (96,199 x .20.... | 19,233 " | |
| | | 29,233 |
| Net amount irrigable..... | | 76,966 |

NOTE: There are 711 Yuma Indians, who may claim 5 acres each, or 3555 acres in all, from the Yuma Reservation and the remaining 12,445 acres gross in the reservation would then bear the charge of this irrigation of the 3555 acres.

ESTIMATE OF COST
OF
LAGUNA DAM & HEADWORKS—LOW LEVEL CANAL.

Crest to be 10 ft. above low water, or elevation 151 ft. Length 4700 ft. Indian Weir Type.

| | | |
|---|---|---|
| Excavation 155,000 plus 33,000 C. Y., at 12¢ equals | $ 22,560 | |
| Add for dredge | 25,000 | $ 47,560 |
| Loose rock fill 300,283 C. Y. at $1.00 in place | | 300,283 |
| Core walls of rubble masonry 27,025 C. Y., at $6.00 | | 162,150 |
| Core walls of concrete 4,371 C. Y. at $8.00 | | 34,968 |
| Coffer Dam—Piles to be 20′ long at 53.25# x 1600 lin. ft. of coffer dam, at 4.5¢ 1,704,000# at 2¼¢ | | 38,340 |
| Driving 6 rows, 28,200 piles, 75¢ plus 25¢ each for pulling | | 28,200 |
| Wood Sheeting inside iron piles 200 M. B. M. at $40.00 | | 8,000 |
| Wood Sheeting inside piles 47, M. B. M. (used 4 times) at $40.00 | | 1,880 |
| Braces | | 1,000 |
| Excavating between piles for upper wall 14,100 C. Y. at $1. | | 14,100 |
| 10—1″ bars, at 2.7# per foot each,—126,900# at 4½¢ | | 5,710 |
| Paving 2′ thick 117.5 ft. wide at $1.20—laid—extra, | | 49,090 |
| 28 sluice gates 10′x10′, at $3.000.00 at dam | | 84,000 |
| 28 piers of 83 C. Y. each, at $6.00 per C. Y. | | 14,000 |
| Hydraulic equipment | | 10,000 |
| Intake for canals | | 4,317 |
| Pumping and Pumping Plant, for construction | | 10,000 |
| | | $813,598 |
| 10% for Engineering and contingencies | | 81,360 |
| | | $894,958 |

NOTE: 210,000 C. Y. solid rock excavation required to make dam. 118,000 C. Y. rock excavation in sluice ways, leaving 92,000 C. Y. excavation borrowed from settling basin on Arizona side. [125]

LAGUNA WEIR, HOLLOW CONCRETE STEEL TYPE.

Height above low water 10′. Length 4700′.

| | | |
|---|---|---|
| Built on Piles: | | |
| Earth excavation for weir | | |
| Dredger .....$25,000 | | |
| 188,000 C. Y. earth at 12¢... 22,560 | | $ 47,560 |
| Piling 6″x1′ sheet 20′ long 120′ B. M. $5.52 per ft.x4700.....$25,944 | | |
| Piling driving 20′ at 12¢—$2.40 per lin. ft.x4700 ..... 11,280 | | |
| Piling, round, 25 lin. ft. at 50¢ $12.50x4700. 58,750 | | |
| Piling, round, driving 25′ at 15¢ $3.75x4700. 17,625 | | 113,599 |
| Caps 8″x10″—68′ B. M. $3.13x4700..... 14,711 | | |
| Floor 3″ plank 250′ b. m. at $46.00—$11.50 lin. ft.x4700 ..... 54,050 | | 68,761 |
| Concrete 10.8 C. Y. per lin. ft.x4700 at $12.00.... | | 609,120 |
| 4″ I Beams, at 7½# per ft. #157.5# per ft. of dam @ 4½¢—$7.09x4700..... | | 33,311 |
| Steel rods 270#, at 4½¢x4700..... | | 57,105 |
| Loose rock apron 20 C. Y. per lin. ft.x4700 at $1.00. | | 94,000 |
| Temporary steel piles—15′ long..... | | 22,400 |
| Wood sheeting inside iron piles 25 m. b. m. at $40,000 ..... | | 1,000 |
| 28 sluice gates 10′x10′ at $3,000 at dam..... | | 84,000 |
| 28 Masonry piers of 83 C. Y. each, at $6.00 per C. Y. ..... | | 13,944 |
| Hydraulic equipment for sluice gates..... | | 10,000 |
| Intake for canals ..... | | 4,317 |
| Pumping and pumping plant, for construction.... | | 10,000 |

| | | |
|---|---|---|
| Rock fill in dam 15.4 C. Y. per Lin. ft.x4700 72,380 C. Y. at $1.00 | | 72,380 |
| | | $1,241.497 |
| 10% for engineering and contingencies | | 124,149 |
| | | $1,365,646 |

NOTE: Loose rock in weir—145,000 C. Y. solid. Total solid rock in sluiceways,=118,000.

LAGUNA WEIR, HOLLOW CONCRETE STEEL TYPE.

Height above low water 10′ 0″—Length 4700 lin. ft.

Built on Pavement.

| | | |
|---|---|---|
| Earth excavation:— | | |
| Dredger | $25,000 | |
| 188,000 C. Y. earth, at 12¢ | 22,560 | $ 47,560 |
| Sheet piling 6″x1′ by 20′—120′ B. M. equals $5.52 per ft.x4700 | | 25,944 |
| Sheet piling driving 20′ at 12¢—$2.40 per lin. ft.x 4700′ | | 11,280 |
| Paving 1.5′ thickx81.25x4700 equals 21,150 C. Y. at $2.20 | | 46,530 |
| 4″ I Beams, at 7.5# per ft. 157.5# per ft. of dam at 4½¢—$7.09x4700 | | 33,311 |
| Concrete in dam 12 C. Y. per lin. ft. at $12x4700 lin. ft. | | 676,800 |
| Steel rods—270#, at 4½¢—$12.15 per lin. ft.x4700. | | 57,105 |
| Loose Rock Apron 20 C. Y. per lin. ft.—$1.00x 4700 | | 94,000 |
| Temporary steel piles—15′ long (cost 4½) 2 2¼¢ | | 22,400 |
| Wood sheeting, (temporary) inside iron piles 25 m. b. m. at $40.00 | | 1,000 |
| 28 sluice gates—10′x10′ at $3,000 at dam | | 84,000 |
| 28 masonry piers of 83 C. Y. each, at $6.00 per C. Y. | | 13,944 |

| | |
|---|---|
| Hydraulic equipment for sluice gates..... | 10,000 |
| Intake for canals ..... | 4,317 |
| Pumping and pumping plant for construction.... | 10,000 |
| Rock fill in dam 15.4 C. Y.x4700 at $1.00..... | 72,380 |
| | $1,210,571 |
| 10% for engineering and contingencies ..... | 121,057 |
| Total..... | $1,331,628 |

NOTE: Total loose rock in weir,—162,000 C. Y. solid rock. Total solid rock in sluice ways, 118,000 C. Y. [126]

LAGUNA WEIR—SOLID RUBBLE MASONRY OVERFLOW TYPE.

Elevation of crest 151 ft.—Height above low water 10′
Length 4700′.

Built on Pavement.

| | | |
|---|---|---|
| Earth excavation. | | |
| 188,000 C. Y., at 12¢ .....22,560 | | $ 47,560 |
| Dredger .....25,000 | | |
| Sheet piling 6″x1′x20′ equals 120′ B. M.x4700x $46.00 per m. ..... | | 25,944 |
| Sheet piling, driving 20′ at 12¢—$2.40x4700..... | | 11,280 |
| Paving 1.5′ thickx72.6—4.03 C. Y. per lin. ft $2.20x 4700 ..... | | 41,670 |
| 6″ I Beams 23.7 lin. ft. at 12.5#—300#x4700 1,410,000# at 4½¢ ..... | | 63,450 |
| Curtain wall 1.8 C. Y. per lin. ft.x4700 at $8.00. | | 67,680 |
| Apron—concrete 4.5 C. Y. per lin. ft.x4700.... | | 169,200 |
| Weir-Cyclopian Rubble—10 C. Y. per lin. ft.x4700 at $6 ..... | | 282,000 |
| Apron 10′x50—20 C. Y. per lin. ft.x4700 at $1.00. | | 94,000 |
| Round bars 4″ diam. at 10.68″ per ft. 43# per ft. of weir at 4½¢x4700..... | | 9,094 |
| Sheet piling steel (temporary work) 3 rows 15′x800′ $\frac{4\frac{1}{2}\#}{2}$ ..... | | 22,400 |

| | |
|---|---|
| Wood sheeting (temporary) inside iron piles 25 M. B. M. at $40.00 | 1,000 |
| 28 sluice gates 10′x10′ at $3,000 | 84,000 |
| 28 masonry piers of 83 C. Y. each at $6.00 per C. Y. | 13,944 |
| Hydraulic Equipment for sluice gates | 10,000 |
| Intake for canals | 4,317 |
| Pumping and pumping plant | 10,000 |
| | $957,539 |
| Engineering and contingencies 10% | 95,754 |
| | $1,053,293 |

CALIFORNIA CANAL.

From Laguna Dam Site to El Rio. Capacity at intake 191.9 S. F. Velocity 1.81 ft. per sec.

| | |
|---|---|
| Settling basin at head of canal 2900 ft. long | 3,785 |
| Excavation 3,785 C. Y. rock at $1.00 per C. Y. | 5,027 |
| 2—6′x10′ Hydraulic Gates, at $2,000.00 | 4,000 |
| 3000 Lin. ft. pressure pipe for gates, at $2.00 | 6,000 |
| 100 Lin. ft. concrete overflow wall, 150 C. Y. at $8.00 | 1,200 |
| 3 concrete gate piers 10 C. Y. each, 30 C. Y. at $8.00 | 240 |
| Gates at head of canal | 250 |
| Intake tunnel, 10x12¢—100 ft., at $30.00 lined | 3,000 |
| 2,900 lin. ft. of canal paving 1 ft. thick, 3,654 C. Y. at $1.20 per C. T. (extra) | 4,385 |
| Main Canal. | |
| Station 28 to 100 (first Diversion) | |
| Cut 9,154 C. Y. at 15¢ $1,373 | |
| Borrow 3, 7989 C. Y. at 12¢ 4,599 | 5,932 |
| Station 100 to 344 (second diversion) | |
| Cut 65,709 C. Y. at 12¢ 7,885 | |
| Borrow 47,680 C. Y. at 12¢ 5,722 | 13,607 |

Main Laterals.

| | | |
|---|---|---|
| 1st, 3.5 mi. | 42,380 C. Y. | |
| 2nd, 4.0 mi. | 48,336 C. Y. | |
| 3rd, 5.0 mi. | 60,477 C. Y. 151,193 C. Y. at 12¢ | 18,143 |
| 3 Main diversions concrete gates | | 2,100 |
| 21 miles clearing, at $100.00 | | 2,100 |
| 5 wagon bridges, at $250.00 | | 1,250 |
| Surface drainage | | 5,000 |
| | | $76,019 |
| Engineering and contingencies 10% | | 7,602 |
| | | $83,621 |

[127]

ARIZONA CANAL.

Settling Basin, 2650′ long.

Velocity 1.0 per sec. Laguna to Yuma inclusive.

| | | |
|---|---|---|
| 17,850 C. Y. rock excavation, at $1.00 | $17,850 | |
| 74,202 C. Y. earth excavation, at 12¢ | 8,904 | |
| 2,650 lin. ft. paving 4.2 C. Y. per lin. ft. 12.130 C. Y. at $1.20 extra | 13,356 | |
| 3—6′x10′ hydraulic lift gates at $2000 | 6,000 | |
| 3,000 lin. ft. pressure pipe at $2.00 | 6,000 | |
| 300 lin. ft. overflow wall, .78 C. Y. at $8 | 1,872 | |
| 4 concrete gate piers 10 C. Y. each at $8 | 320 | |
| 730 lin. ft. intake cut, paid for in excavation of dam. | | |
| Regulating gates at head of canal | 500 | $54,802 |
| Canal Section 1, V equals 2.18 Q equals 1064.4 S. F.—290,927 C. Y. earth at 12¢ | 34,911 | |
| 1,453 C. Y. rock, at $1.00 | 1,453 | 36,364 |
| Canal Section 2, V equals 2.18—Q equals 928.2 626,195 C. Y. earth at 12¢ | | 75,143 |

| | | |
|---|---|---|
| Section 3, Gila Crossing (Estimated separately) | | |
| Section 4, V equals 2.25—Q equals 848.2 S. F. 806,372 C. Y. earth at 17¢ (steam shovel)... | | 137,083 |
| Section 5, V equals 2.25—Q equals 775.8 s. f. 1,025,544 C. Y. earth, at 15¢ (steam shovel).. | | 153,832 |
| Section 6, V equals 2.25—Q equals 727.3 s. f. 584,536 C. Y. earth at 12¢..... | | 70,144 |
| Section 7, V equals 2.25—Q equals 724 s. f. 78, 907 C. Y. earth, at 12¢..... | | 9,469 |
| Section 8 (Yuma cut) V equals 5.0 Q. equals 711.1 s. f. 13,497 C. Y. loose rock at 60¢ ..... | $8,098 | |
| 59,248 C. Y. Gravel at 17¢..... | 10,072 | |
| 1540 C. Y. lining in concrete at $8.00.. | 12,320 | |
| 500 lin. ft.—1500 C. Y. rubble masonry wall at $6.00 ..... | 9,000 | |
| 3 bridges ..... | 8,000 | |
| Right of way damages..... | 2,000 | 49,490 |
| 10 road bridges at $250.00 each..... | | 2,500 |
| Surface drainage crossings ..... | | 7,000 |
| Lateral No. 1—V equals 2.0—Q equals 38.4 length 3.5 mi.—33,264 C. Y. earth excavation, at 12¢. | | 3,991 |
| Lateral No. 2—V. equals 2.0—Q equals 70.1 length 8.0 mi.—84,480 C. Y. earth excavation,..... | | 10,137 |
| Lateral No. 3,—V equals 2.0—Q equals 35.6 Length 2.0 mi.—19,008 C. Y. earth excavation..... | | 2,281 |
| Lateral No. 4—V equals 2.0—Q equals 57.0 Length 9.0 mi.—85,536 C. Y. earth excavation at 12¢. | | 10,264 |
| Lateral No. 5—V. equals 2.0—Q equals 40.6 Length 4.5 mi.—42,768 C. Y. earth excavation at 12¢. | | 5,132 |
| Clearing for laterals ..... ..... | | 2,400 |
| | | 630,032 |
| Engineering and contingencies 10%..... | | 63,003 |
| | | $693,035 |

[128]

GILA CROSSING.

To be a steel concrete covered structure 3,200 ft. long without pressure passing under the stream bed.

Conduit.

| | |
|---|---|
| 140,800 C. Y. earth excavation at 17¢ (steam shovel) | $ 23,936 |
| 15,104 C. Y. concrete, at $8.00 | 120,832 |
| 1,051,520# steel bars at 4¢ | 42,061 |
| 3,424 C. Y., dry rubble paving at $2.20 | 7,533 |
| 5,152 C. Y. gravel, at 70¢ (beneath paving) | 3,606 |

Approaches.

| | |
|---|---|
| 300 lin. ft. of lined rock cut, at $35.00 | 10,500 |
| 4 sluice gates 6'x8', at $1,500 | 6,000 |
| Hydraulic equipment | 2,500 |
| 40 C. Y. concrete in gate piers, at $8.00 | 320 |
| | 217,288 |
| Engineering and contingencies 10% | 21,729 |
| | $239,017 |

ARIZONA CANAL.

Below Yuma.

| | |
|---|---|
| Section No. 9—V equals 2.1—Q equals 646.9 536,856 C. Y. excavation, earth at 12¢ | 64,423 |
| Section No. 10—V equals 2.1—Q equals 539.1 112,623 C. Y. excavation earth at 12¢ | 13,515 |
| Section 11, V equals 2.1—Q equals 359.9 230,968 C. Y. excavation earth at 12¢ | 27,716 |
| Section 12—V equals 2.55—Q equals 175.8 106,085 C. Y. excavation earth at 12¢ | 12,730 |
| Lateral No. 6 (pump) V equals 2.0—Q equals 34.1 Length 3 mi. 28,512 C. Y. excavation earth at 12¢ | 3,421 |
| Lateral No. 7 V equals 2—Q equals 117.6 length 5 mi. 52,800 C. Y. excavation earth at 12¢. | 6,336 |
| Lateral No. 8 V equals 2.0—Q equals 179.8 length 5.5 mi. 64, 492 C. Y. excavation earth at 12¢. | 7,739 |

| | |
|---|---|
| Lateral No. 9—V equals 2.0—Q equals 169.8 Length 6.5 mi. 78,936 C. Y. excavation earth at 12¢. | 9,472 |
| Lateral No. 10 V equals 2.0—Q equals 168.6. Length 6.5 mi. 78,936 C. Y. excavation earth at 12¢. | 9,472 |
| Total..... | $154,824 |
| 4 Gates and drops—at $1,700 each..... | 6,800 |
| 10 wooden bridges at $250. each..... | 2,500 |
| Surface drainage ..... | 3,000 |
| Clearing for laterals ..... | 2,650 |
| | $169,774 |
| Engineering and contingencies 10%..... | 16,977 |
| Total..... | $186,751 |

[129]

ESTIMATE OF COST OF #3 DAM & HEAD WORKS LOW LEVEL CANAL.

Crest to be 7.6 ft. above Low water (154 ft.) Length 2,800 ft. Indian Weir Type.

| | |
|---|---|
| 2,800′ of weir with 63,89 C. Y. loose rock 178,892 C. Y. at $1.00..... | $178,892 |
| 2,800′ of weir with 5.74 C. Y. rubble masonry 16,072 C. Y. at $6.00..... | 96,432 |
| 2,800′ of weir with .93 C. Y. concrete masonry 2,604 C. Y. at $8.00..... | 20,832 |
| Coffer dam piles 20′ long—800 lin. ft. of dam 1,704,000#, at 4½ | |
| 2 ..... | 38,340 |
| Driving and pulling 6 rows of 2,800 piles, equals 16,800 piles at $1.00 (75¢ plus 25¢)..... | 16,800 |
| Wood sheeting inside piles & below water—lost 120# m., at $40.00..... | 4,800 |
| Wood sheeting inside piles and above water—used 4 times, 28# m., at $40.00..... ..... | 1,200 |
| Braces ..... ..... | 600 |

| | |
|---|---|
| Excavating between piles for upper wall, 8,400 C. Y. at $1 | 8,400 |
| 10—1″ bars at 2.7# per ft. 76,140# at 4½ ¢ | 3,426 |
| Paving 2′ thick, 117.5 wide at $1.20 per C. Y. laid (extra) 24,370 C. Y. | 29,244 |
| 28 sluice gates, at $3,000 at dam (10′ x 10′) | 84,000 |
| 28 piers for sluice gates, 83 C. Y. each at $6.00 C. Y. | 14,000 |
| Hydraulic equipment for gates | 10,000 |
| Intakes for canals | 4,317 |
| Pumping and pumping plant, for construction | 10,000 |
| Earth excavation for dam and foundations, 279,962 C. Y. at 12¢ | 33,595 |
| Dredger | 25,000 |
| Sluice Ways California Side. | |
| Earth excavation 112,808 C. Y. at 12¢ $13,537 | |
| Rock excavation 161,863 C. Y. | |
| Arizona Side. | |
| Earth excavation, 99,860 C. Y. at 12¢ 11,983 | |
| Rock excavation 199,823 C. Y. | |
| Total C. Y. loose rock in dam 197,568 equivalent to 131,712 C. Y. solid rock dam. | |
| Surplus C. Y. solid excavation in sluice ways 229,974. | |
| 229,974 C. Y. solid rock excavation surplus in sluice ways, at $1.00 229,974 | 255,494 |
| | $835,292 |
| Engineering and contingencies 10% | 83,529 |
| | $918,821 |

[130]

COLORADO RIVER—LOOSE ROCK DAM.

Dam site #3. Elevation of crest of weir 158′

| | |
|---|---|
| Excavation in rock, 411,730 C. Y., equals 322,422 C. Y. in works 89,308 C. Y. waste at 75¢.... | $66,981.00 |
| Excavation in gravel and bolders (waste) 277,778 C. Y. 75¢..... | 20,833.50 |
| Excavation in earth (coffer dam, etc.) 70,000 C. Y. at 25¢ ..... | 17,500.00 |
| Loose rock in dam, 194,124 C. Y. at $1.25..... | 242,655.00 |
| Loose rock in wing wall, 64,000 C. Y. at $1.25.... | 80,000.00 |
| Loose rock for protection to toe of dam, 38,001 C. Y. at $1.25..... | 47,501.25 |
| Loose rock in apron 26,296 C. Y., at $1.25..... | 32,870.00 |
| Loose rock in apron, hand laid 4,630 C. Y. at 70¢.. | 3,241.00 |
| Bracing for coffer dam, 180,960 B. M. ft., at $40.00 ..... | 7,238.40 |
| Coffer dam for regulator and sluiceway, 2,081 Lin. ft. at $17.00..... | 35,360.00 |
| Concrete in Arizona Regulator structure, 2,250 C. Y. at $10.00..... | 22,500.00 |
| Concrete in Arizona Sluice gate structure, 3,033 C. Y. at $10.00..... | 30,330.00 |
| Mortar for facing rock cut in canal headings and for facing rock cuts in sluiceways, 885.2 C. Y. at $12. ..... | 10,622.40 |
| Concrete in wall between sluiceways and weir, Arizona side, 2130 C. Y., at $10..... | 21,300.00 |
| Concrete in weir, 1,990 C. Y., at $10.00..... | 19,900.00 |
| Concrete in wall between weir and sluice way, California side, 3,016 C. Y., at $10..... | 30,160.00 |
| Concrete for California Sluice gate structure, 1,560 C. Y., at $10. ..... | 15,600.00 |
| Concrete for California Regulator structure, 1,075 C. Y., at $10. ..... | 10,750.00 |
| Concrete Walls at California Canal headings 7,485 C. Y. at $10.00..... | 74,850.00 |

| | |
|---|---|
| Pile foundation for wall Calif. side 100 piles at $17. | 1,700.00 |
| Pile foundation for wall Calif. side 261 x 20 equals 5220, at 60¢ | 3,132.00 |
| Pile foundation for wall Calif. side, 150 x 10 equals 1500, at 60¢ | 900.00 |
| Gates in Regulators Arizona side (flashboards) 20 sets, at $150.00 (not designed or worked out). | 3,000.00 |
| Gates in Regulators Calif. side (flashboards) 12 sets, at $150.00 (not designed or worked out) | 1,800.00 |
| Gates in sluiceway, Calif. side 10′ x 12′ screw gate 6 sets at $2,500 (not designed or worked out). | 15,000.00 |
| Gates in sluiceway, Arizona side 10′ x 12′, screw gate 15 sets, at $2,500 (not designed or worked out) | 37,500.00 |
| Total | $853,224.55 |
| Engineering 5% | 42,661.23 |
| Plant and contingencies 5% | 42,661.23 |
| Total | $938,547.01 |

NOTE: 25% per C. Y. is estimated as cost of transmitting and distributing rock. Green's estimate. [131]

AGRICULTURAL PRODUCTS OF YUMA VALLEY.

Upon aithority of R. H. Forbes, Director of Agricultural Experiment Station University of Arizona, Tucson, the following are SURE CROPS SUCCESSFULLY AND PROFITABLY RAISED:—

Wheat, barley, oats, Egytian corn, sorghum, alfalfa, potatoes, tomatoes, melons, bush squashes, crook neck pumpkins, cucumbers, garden peas, cabbage, lettuce, beets, spinach carrots, turnips, radishes, asparagus, grapes, peaches, plums, apricots, almonds, pears, olives, dates, pomegranates.

The prices of labor are—

White man $1.50 to $2.00 a day, or $30.00 a month and board.

Indian, $1.25 to $1.50 a day (but does better work under contract).

Terms $3.50 to $4.00 a day, 2 horses and driver. $5.00 a day, 4 horses and driver.

Costs of producing and price of selling of principal forage crops. (The prices quoted are the prices paid at Yuma during 1903.) (Alfalfa costs for seeding $2.50 per acre, and one seeding last 10 years or more; allow 25¢ a year for seeding.)

| | Alfalfa. | Barley & Wheat Hay. (One crop.) |
|---|---|---|
| Seeding per acre. | .25 | $2.00 |
| Water pumped, per acre. | 6.50 | 1.75 |
| Irrigation per acre. | 1.00 | .25 |
| Harvesting & stacking per ton. | 1.25) | 1.50) |
| Threshing per cwt. bailing per ton. | ) 5.50 | ) 5.75 |
| | 2.25) per ton | 2.25) per ton. |
| Hauling to R. R. | 2.00) | 2.50) |
| Amount produced per acre. | 7–10 tons. | 1½ to 2½ tons. |
| Probable average. | 8 tons. | 2 tons. |
| Cost per acre delivered R. R. | 51.75 | 15.50 |
| Cost per unit. | 6.45 ton. | 7.75 per ton. |
| Selling price per unit. | 11.00 ton. | 11.50 per ton. |
| Profit per unit. | 4.55 ton. | 3.25 per ton. |
| Profit per acre. | 36.40 | 6.50 |
| Yearly profit on 40 acres. | $1,456.00 | $260.00 |

Hay and grain can be grown in winter, and corn, sorghum, and vegetables in summer on the same land.

Alfalfa hay placed in stack costs $2.21 a ton.

Some exceptional yields of 2½ tons per acre to the cutting of alfalfa have been reported by reputable farmers.

| Barley. | Wheat. |
|---|---|
| $2.00 | $2.00 |
| 1.75 | 1.75 |
| .25 | .25 |
| 3.00 per acre. | 3.00 per acre. |
| .18 | .18 |
| 2.00 | 2.00 |
| ¾ to 1½ tons. | ½ to 1 tons. |
| 1 ton. | 3.4 ton. |
| $12.60 | $11.70 |
| .63 per cwt. | .78 per cwt. |
| 1.25 per cwt. | 1.75 per cwt. |
| .62 per cwt. | .97 per cwt. |
| 12.40 | 14.55 |
| $496.00 | $582.00 [132] |

EXCEPTIONAL YIELDS.

Mr. G. C. Thacker, who lives 3 miles below Yuma has a ranch of 60 acres.

He paid $3,500 for ranch 2 years ago, and has recently refused an offer of $6,000.00 20 acres is unimproved, 6 acres in fruit and remainder in alfalfa.

Crops 1903.

| | | |
|---|---|---|
| Apricots, 2 acres—8 years old, sold 4000 lbs. at 2¢.. | | $80.00 |
| 8 tons alfalfa cut from between trees at $11..... | | 88.00 |
| | | $168.00 |
| Pears, 2 acres—7 years old sold 2300 lbs. at 3½¢ ..... | $80.50 | |
| 8 tons alfalfa cut from between trees, at $11. | 88.00 | 168.50 |
| Grapes, ½ acre—8 years old—sold 10,000 lbs., at 3½¢ ..... | | 350.00 |
| Pomegranates — 750 hedge — much fruit wasted—sold ..... ..... | | 100.00 |
| Total from 4½ acres..... | | $786.50 |

No fertilizer used—Apricots and pears not cultivated.

BLAISDELL RANCH.

Located on Mesa above Yuma. Water pumped over 80 ft. No. figures cost of pumping obtainable.

| Crop. | Production. Acres. | # Acres. | Price. Lb. | Value per Acre. | Date Marketed. |
|---|---|---|---|---|---|
| Oranges | 25 | 2600 | 2¢ | $ 52.00 | Nov. 25 to March 1st. |
| Grapes | 18 | 1650 | 5¢ | 82.50 | June 18, to July 28. |
| Cantaloupe | 14 | 6220 | 2¢ | 124.40 | June 8, to July 31. |
| Apricots | 10 | 780 | 5¢ | 39.00 | May 7 to May 25. |
| Figs | 2 | 3000 | 10¢ | 300. | May 23 to July 31. |
| Cucumbers | 6 | 9000 | 4¢ | 360. | May 13 to July 7. |

Some of this early fruit was sent to San Francisco, but most of the crop was marketed in Arizona.

IRRIGATION FROM COLORADO RIVER DURING AUGUST & SEPTEMBER.

Irrigable acres south of Bulls Head from the normal flow of the Colorado River during the controlling months of August and Sept. for years of mean and low discharge.

General farming under the Yuma Pumping Plant ditch during 1903, required a total depth of 5.5′ or 5.5 acre ft. per acre actually irrigated. During August 0.80 acre ft. and during September 0.56 acre ft. were used. On this basis 1 acre ft. in August will irrigate, 1 divided by .8, equals 1.25 acres, and in September 1 acre ft. will irrigate 1 divided by .56, equals 1.78570 plus.

It is assumed that 25% of the land under the ditches will be unirrigated. This gross a*res* expressed in terms of the net a*res* (land actually irrigated) is 100 divided by 75, equals 1,333 plus net areas. [133]

AREAS IRRIGABLE FROM COLORADO RIVER DISCHARGE.

| | Aug. Mean Year. | Low Year. | Sept. Mean Year | Low Year. |
|---|---|---|---|---|
| Supply available ac. ft. | 297,586 | 240,000 | 222,208 | 200,000 |
| loss by seepage 25% ac. ft. | 74,396 | 60,000 | 55,552 | 50,000 |
| Net supply ac. ft. | 223,190 | 180,000 | 166,656 | 150,000 |
| Irrigable area net acres | 278,987 | 225,000 | 297,600 | 267,857 |
| Irrigable area gross ac. | 371,983 | 300,000 | 396,800 | 357,143 |

Irrigable Areas.

Valley land between Bulls Head and Picacho.....232,000 acres
Valley land between Picacho and Mexico..... 76,966 "

Total net areas irrigable land acres.....308,966 acres

SEEPAGE AND RETURN WATERS.

Seepage and return waters from valley lands above Picacho assumed to be 50% of annual irrigation, equals 232,000x2.75 divide 12 equals 53,167 acre ft. per month.

Assume the seepage losses for this water the same as above, viz: 25% and the amount of water available from this source is 53,167x.75 equals 39,875 acre ft. monthly. This will supply in August 49,844 acres and in September 71,205 acres net. Will supply in August 66,459 acres and in September 94,940 acres gross.

IRRIGABLE AREAS. (GROSS ACRES.)

| | August. Mean Year. | Low Year | September. Mean Year. | Low Year. |
|---|---|---|---|---|
| From direct diversion | 371,983 | 300,000 | 396,800 | 357,143 |
| From seepage and return water | 66,459 | 66,459 | 94,940 | 94,940 |
| From all sources | 438,442 | 366,459 | 491,740 | 452,083 |
| Total Valley Bulls Head to Mexico | 308,966 | 308,966 | 308,966 | 308,966 |
| Available for Imperial and Mexico | 129,476 | 57,493 | 182,774 | 143,117 |

MAIN DRAINAGE CANALS.

| | | |
|---|---|---|
| Arizona side. | | |
| North of Gila 21,120 lin. ft. at 5 C. Y. 105,600 C. Y. at $10.00 | $10,560 | |
| South of Gila, excavation for levee and irrigation canal will make drainage canals. | | |
| Below Yuma, 116,160 lin. ft. at 5 C. Y. 580,800 C. Y. at $10.00 | 58,080 | |
| California Side, 36,960 lin. ft. at 4.7 C. Y. 173,712 at $10.00 | 17,371 | |
| Total | 86,011 | |
| Engineering and contingencies 10% | 8,601 | |
| | $94,611 | |

LEVEES.

| | | |
|---|---|---|
| California Side 644,557 C. Y. plus 10% for shrinkage, equals 709,000 C. Y. at 12¢ (mean height 7½′) | $85,080 | |
| 15 miles cleaning at $270 (18ax$15) | 4,050 | $ 89,130 |
| Arizona side, Colorado River Levees above Yuma 412,561 C. Y. plus 10% for shrinking, 453,817 C. Y. at 12¢ | 54,458 | |
| Gila River levees, 859,382 C. Y. plus 10% for shrinkage, 945,320 C. Y., at 12¢ | 113,438 | |
| Cleaning Arizona side above Yuma, 21 mi. at $135.00 | 2,835 | 170,731 |
| Below Yuma 898,424 C. Y. plus 10% for shrinkage, 988,267 at 12¢ | 118,592 | |
| Cleaning Arizona side below Yuma, 25 mi. at $270.00 | 6,750 | 125,342 |

PUMPING PLANTS FOR DRAINAGE & IRRIGATION.
SUMMARY.

| | | |
|---|---|---|
| Power plant | | $ 25,000 |
| Drainage pumping plant No. 1 | $7,500 | |
| " " " " 2 | 11,000 | |
| " " " " 3 | 16,000 | |
| Irrigation " " " 4 | 5,000 | |
| " " " " 5 | 6,000 | |
| " " " " 6 | 6,500 | 52,000 |
| | | $ 77,000 |
| 21 miles pole line complete, in place | | 8,500 |
| 2 River crossings | | 4,000 |
| Wires for 21 miles of line | | 10,500 |
| | | $ 100,000 |
| Power plant building and sluiceways | $6,000 | |
| 6 Pumping stations | 18,000 | 24,000 |
| Grand Total | | $124,000 |

[135]

COLORADO RIVER. YUMA PROJECT.
Preliminary Estimate March 1904.

For Laguna dam site low line canal in California & Arizona.

| | |
|---|---|
| Laguna weir—Indian type | $894,958 |
| California Ca*lan* | 83,621 |
| Arizona Canal.....Above Yuma | 693,035 |
| Arizona Canal.....Below Yuma | 186,751 |
| Arizona Canal.....Gila Crossing | 239,017 |
| Levees # California side | 89,130 |
| Arizona side above Yuma | 170,731 |
| Arizona side below Yuma | 125,342 |
| Pumping plant for irrigation and drainage | 124,000 |
| Drainage system | 94,611 |
| | $2,701,196 |

Net area irrigable in Yuma Project.....76,966 acres
Rate per acre .....$35.10

ADDITIONAL ESTIMATES.

Dam Site #3 low level canal headworks Indian weir type ..... $918,821
Laguna weir—Hollow concrete steel type on pavement. 1,331,628
Laguna weir—hollow concrete steel type on piles.... 1,365,646
Rock fill dam at site No. 3..... 938,547
Laguna weir—solid rubble, on pavement..... 1,053,293
Canals from dam site to Laguna Arizona side.
Canals dam site to Laguna, Calif. side.

(Signed) J. B. LIPPINCOTT,
(Signed) HOMER HAMLIN. [136]

## EXHIBIT II—YUMA PROJECT.

Estimate April, 1904.

### BASIS OF ESTIMATE.

Low Level Canal Line.

Laguna Weir—Map on scale 100′ to 1″ and soundings.

Dam Site No. 3 Weir—Map on scale 100′ to 1″ and soundings.

California Canal—Map on scale 100′ to 1″.

Arizona Canal—Map on scale 100′ to 1″ to Yuma and various angle line Surveys. Below Yuma, angle line surveys only.

Gila crossing—Map on scale 100′ to 1″ and soundings.

Levee California Side—Preliminary location surveys and cross-sections and observation of high-water marks.

Levee Arizona Side—Preliminary location surveys and cross-sections and observation of high-water marks.

Levee Gila—Preliminary location surveys and cross-sections and observation of high-water marks.

Pumping Plants (estimate by Mr. Storrs) based on levels for heads and 50% of irrigation water; seepage water to be lifted over levees during floods.

Drainage System—Only a rough estimate based upon maps on scale of 2″ to 1 mile.

High Level Canal Line.

The exploration for bed rock along the Colorado River has been unfavorable at the Yuma Dam Site, at Picacho, and at Bill Williams. The fact that high dams could not be built, in addition to the extreme roughness of the Mesa side hill, where the High Line Canal would be constructed, makes it practically impossible to put a High Line Canal on the Mesa. Extended surveys have been made to reach this territory, but the estimate therefore is not completed and the enterprise is not considered feasible.

The field work for this estimate has been performed under the direction of Mr. E. T. Perkins, engineer of all Colorado River surveys—Mr. J. C. Clausen, as engineer in charge of field location parties—Mr. Homer Hamlin, as engineer has prepared most of the plans and estimates—Mr. J. B. Lippincott, Supervising Engineer, has been through all the engineering features of the plans and field work, and has prepared estimates in connection with Mr. Hamlin and Mr. Perkins, and all are personally familiar and responsible both for the designs and costs. [137]

AREAS OF IRRIGATION DISTRICTS.

All Inside of Levees.

| | | | | |
|---|---|---|---|---|
| California | District | No. 1— | 6,400 Acres. | |
| " | " | No. 2— | 6,600 " | |
| " | " | No. 3— | 3,000 " | |
| | | Total..... | 16,000 | |
| Arizona | District | No. 1— | 3,380 Acres. | |
| " | " | No. 2— | 6,972 " | |
| " | " | No. 3— | 3,136 " | Under Pump. |
| " | " | No. 4— | 4,990 " | Under Pump. |
| " | " | No. 5— | 3,570 " | |
| " | " | No. 6— | 3,000 " | Under Pump. |
| " | " | No. 7— | 10,350 " | |
| " | " | No. 8— | 15,820 " | |
| " | " | No. 9— | 14,947 " | |
| " | " | No. 10— | 14,834 " | |
| " | " | No. 11— | 10,000 " | Considered as swamp and overflow. |
| | | Total..... | 90,999 | |

Area North of Laguna Dam Site..2,625—Not available if Laguna weir is built.

Total California .....16,000 Acres.
Total Arizona .....90,999 "

Grand Total .....106,999

Not available for Irrigation:

District No. 11—overflow..... 5,000 Acres.
15% of remainder (96,999x.15) .14,550 " 19,550
Net amount irrigable .....87,449

NOTE: There are 711 Yuma Indians, who may claim 5 acres each, or 3,555 acres in all, from the Yuma Reservation and the remaining 12,445 acres gross in the reservation would then bear the charge of this irrigation of the 3,555 acres. [138]

ESTIMATE OF COST OF LAGUNA DAM & HEADWORKS—LOW LEVEL CANAL.

Crest to be 10 ft. above low water, or elevation 151 ft. Length 4700 ft.

Indian Weir Type.

| | | |
|---|---|---|
| Excavation 156,000 plus 33,000 C. Y., at 12¢ equals | $22,560 | |
| Add for dredge | 25,000 | $ 47,560 |
| Loose rock fill 300,283 C. Y., at $1.00 in place | | 300,283 |
| Core walls of rubble masonry 19,625 C. Y., at $7.00 | | 137,375 |
| Core walls of concrete 4,371 C. Y., at $8.00 | | 34,968 |
| Coffer Dam—Piles to be 20′ long at 33.25#x1600 lin. ft. of coffer dam, at 4.5¢ | | |
| 2 1,704,000# at 2¼¢ | | 38,340 |
| Driving 6 rown, 28,200 piles, 75¢ plus 25¢ each for pulling | | 28,200 |
| Wood sheeting inside iron piles 200 m. b. m. at $40.00 | | 8,000 |
| Wood sheeting inside iron piles 47 m. b. m. (Used 4 times) at $40.00 | | 1,880 |
| Braces | | 1,000 |
| 10—1″ bars, at 2.7# per foot each—126,000# at 4½¢ | | 5,710 |
| Paving 2′ thick 117.5 ft. wide, at—40,908 C. Y., at $2.00 laid—extra | | 81,816 |
| 28 sluice gates 10′x10′, at $3,000.00 at dam | | 84,000 |
| 28 piers of 83 C. Y. each, at $7.00 per C. Y. | | 16,268 |
| Hydraulic equipment | | 10,000 |
| Intake for canals | | 4,317 |
| Pumping and pumping plant, for construction | | 10,000 |
| 676.8 m. b. m., at $40.00 (piling 9″x12″x16′x4700′) | | 27,072 |
| 4700 Piles driven, at $1.92 | | 9,024 |
| | | $ 845,613 |
| 15% for engineering & contingencies | | 126,842 |
| | | $ 972,455 |

NOTE: 210,000 C. Y. solid rock excavation required to make dam. 118,000 C. Y. rock excavation in sluice ways, leaving 92,000 C. Y. excavation borrowed from settling basin on Arizona side.

The upper masonry crest is cut to low water except when bed is deeper and then to bed.

This is at the rate of $1.50 per C. Y. Quarry Measurement.

[139]

CALIFORNIA CANAL.

From Laguna Dam to El Rio. Capacity at intake 191.9 s. f.
Velocity 1.81 ft. per sec.

Settling basin at head of canal 2,900 ft. long.

| | | |
|---|---|---|
| Excavation 3,785 C. Y. rock, at $1.00 per C. Y..... | | $3,785 |
| Excavation 20,109 C. Y. gravel, at 25¢ per C. Y... | | 5,027 |
| 2—6′ x 10′ hydraulic gates, at $2,000.00..... | | 4,000 |
| 3000 lin. ft. pressure pipe for gates, at $2.00..... | | 6,000 |
| 100 lin. ft. concrete overflow wall, 150 C. Y. $8.00. | | 1,200 |
| 3 concrete gate piers 10 C. Y. each, 30 C. Y., at $8.00 ..... ..... ..... | | 240 |
| Gate at head of canal..... | | 250 |
| 2,900 lin. ft. of canal paving 1 ft. thick 3,654 C. Y., at $1.20 per C. Y. (extra)..... | | 4,385 |
| Main Canals. | | |
| Station 28 to 100 (first division) cut 9,154 C. Y., at 15¢..... | $1,373 | |
| Borrow 37,989 at 12¢..... | 4,559 | 5,932 |
| Station 100 to 344 (second division) cut 65,709 C. Y. at 12¢..... | 7,885 | |
| Borrow 47,680 C. Y. at 12¢..... | 5,722 | 13,607 |
| Main Laterals. | | |
| 1st.. 3.5 mi. 42,380 C. Y. | | |
| 2nd., 4.0 mi. 48,336 C. Y. | | |
| 3rd., 5.0 mi. 60,477 C. Y. 151,193 C. Y., at 12¢.. | | 18,143 |
| 3 Main diversions concrete gates..... | | 2,100 |

| | |
|---|---|
| 21 miles clearing, at $100.00 | 2,100 |
| 5 wagon bridges, at $250.00 | 1,250 |
| Surface drainage | 5,000 |
| | $76,019 |
| Engineering and contingencies 15% | 11,403 |
| | $87,422 |

[140]

## ARIZONA CANAL.

Settling basin 2650′ long.

Velocity 1.0 per sec. Laguna to Yuma Inclusive.

| | | |
|---|---|---|
| 17,850 C. Y. rock excavation, at $1.00 | $17,850 | |
| 74,202 C. Y. earth excavation, at 15¢ | 11,130 | |
| 2,650 lin. ft. paving 4.2 C. Y. per lin. ft. 12,130 C. Y. at $1.20, extra | 13,356 | |
| 3—6′ x 10′ hydraulic lift gates, at $2000 | 6,000 | |
| 3,000 lin. ft. pressure pipe, at $2.00 | 6,000 | |
| 300 lin. ft. overflow wall. .78 C. Y., at $8.00 | 1,872 | |
| 4 concrete gate piers 10 C. Y. each, at $8.00 | 320 | |
| 730 lin. ft. intake cut, paid for in excavation of dam. | | |
| Regulating gates at head of Canal | 500 | $57,028 |
| Canal Section 1, V equals 2.18, Q equals 1064.4 s. f.—290,927 C. Y. earth at 15¢ | $43,639 | |
| 1,453 C. Y. rock, at $1.00 | 1,453 | 45,092 |
| Section 2, V equals 2.18 Q equals 928.2 626,195 C. Y. earth, at 15¢ | | 93,929 |
| Section 3, Gila Crossing (Estimated separately.) | | |
| Section 4, V equals 2.25—Q equals 848.2 s. f. 806,372 C. Y. earth, at 15¢ (steam shovel) | | 120,956 |
| Section 5, V equals 2.25—Q equals 775.8 s. f. 1,025,544 C. Y. earth, at 15¢ (Steam Shovel) | | 153,832 |
| Section 6, V equals 2.25—Q equals 727.3 s. f. 584,536 C. Y. earth, at 15¢ | | 87,680 |

| | | |
|---|---|---|
| Section 7, V equals 2.25—Q equals 724 s. f. 78,907 C. Y. earth, at 15¢ | | 11,836 |
| Section 8, (Yuma Cut) V equals 5.0—Q equals 711.1 s. f. 13,497 C. Y. loose rock at 60¢ | $ 8,098 | |
| 59,248 C. Y. gravel at 15¢ | 8,887 | |
| 1540 C. Y. lining in concrete, at $8.00 | 12,320 | |
| 500 lin. ft.—1500 C. Y. rubble masonry wall, at $6.00 | 9,000 | |
| 3 Bridges | 8,000 | |
| Right of way damages, | 2,000 | 43,305 |
| 10 road bridges at $250.00 each | | 2,500 |
| Surface drainage crossings, | | 7,000 |
| Lateral No. 1—V equals 2.0—Q equals 38.4 length 3.5 mi.—33.264 C. Y. earth excavation at 12¢ | | 3,991 |
| Lateral No. 2—V equals 2.0—Q equals 70.1 Length 8.0 mi—84,480 C. Y. earth excavation at 12¢ | | 10,137 |
| Lateral No. 3—V equals 2.0—Q equals 35.6 Length 2.0 mi. 19,008 C. Y. earth excavation, at 12¢ | | 2,281 |
| | | $644,567 |
| Charge 15¢ for all earth and gravel excavation except laterals. | | |
| Lateral No. 4 V equals 2.0—Q equals 57.0. Length 9.0 mi. 85,536 C. Y. earth excavation, at 12¢ | | 10,264 |
| Lateral No. 5 V equals 2.0—Q equals 40.6. Length 4.5 mi. 42,768 C. Y. earth excavation, at 12¢ | | 5,132 |
| Clearing for laterals | | 2,400 |
| | | $662,363 |
| Engineering and contingencies 15% | | 99,354 |
| | | $761,717 |

[141]

GILA CROSSING.

To be a steel concrete covered structure 3,200 ft. long without pressure passing under the stream bed.

| | |
|---|---|
| Conduit. | |
| 140,800 C. Y. earth excavation, at 17¢ (Steam shovel) | $ 23,936 |
| 15,104 C. Y. concrete, at $8.00, | 120,632 |
| 1,051,520# Steel bars, at 4¢ | 42,061 |
| 8,960 C. Y. Loose Rock fill below conduit, at $1.00, | 8,960 |
| 1720 C. Y. Concrete invert, at $8.00 | 13,760 |
| Approaches. | |
| 300 lin. ft. of lined rock cut, at $35.00 | 10,500 |
| 4 sluice gates 6′ x 8′, at $1,500, | 6,000 |
| Hydraulic equipment, | 2,500 |
| 40 C. Y., concrete in gate piers, at $8.00 | 320 |
| | $228,669 |
| Engineering and Contingencies 15% | 34,300 |
| | $262,969 |

[142]

ARIZONA CANAL.

Below Yuma.

| | |
|---|---|
| Section No. 9—V equals 2.1—Q equals 646.9 536,856 C. Y. excavation, earth, at 12¢ | $ 64,423 |
| Section No. 10—V equals 2.1—Q equals 539.1 112,623 C. Y. excavation, earth, at 12¢ | 13,513 |
| Section No. 11,—V equals 2.1—Q equals 359.9 230,968 C. Y. excavation, earth, at 12¢ | 27,716 |
| Section 12—V equals 2.55—Q equals 175.8 106,085 C. Y. excavation, earth, at 12¢ | 12,730 |
| Lateral No. 6 (pump) V equals 2.0—Q equals 34.1 Length 3 mi. 28,512 C. Y. excavation, earth, at 12¢ | 3,421 |
| Lateral No. 7, V equals 2—Q equals 117.6 length 5 mi. 52,800 C. Y. excavation earth, at 12¢ | 6,336 |

| | |
|---|---|
| Lateral No. 8 V equals 2.0—Q equals 179.8 Length 5.5 mi. 64,492 C. Y. excavation, earth, at 12¢.. | 7,739 |
| Lateral No. 9 V equals 2.0—Q equals 169.8 Length 6.5 mi. 78,936 C. Y. excavation, earth, at 12¢.. | 9,472 |
| Lateral No. 10, V equals 2.0—Q equals 168.6 Length 6.5 mi. 78,936 C. Y. excavation, earth, at 12¢.. | 9,472 |
| | $154,824 |
| 4 Gates and drops—at $1,700 each..... | 6,800 |
| 10 Wooden bridges, at $250.00 each..... | 2,500 |
| Surface drainage ..... | 3,000 |
| Clearing for laterals..... | 2,650 |
| | $169,774 |
| Engineering and contingencies 10%..... | 16,977 |
| Total..... | $186,751 |

[143]

MAIN DRAINAGE CANALS.

| | |
|---|---|
| Arizona Side. | |
| North of Gila 21,120 lin. ft. at 5 C. Y.—105,600 C. Y. at 10¢ per C. Y..... | $ 10,560 |
| South of Gila, excavation for levee and irrigation canal will make drainage canals. | |
| Below Yuma, 116,160 lin. ft. at 5 C. Y. 580,800 C. Y., at ten cents..... | 58,080 |
| California side, 36,960 lin. ft. at 4.7 C. Y., 173,712 C. Y. at ten cents,..... | 17,371 |
| Total..... | $ 86,011 |
| Engineering and Contingencies 15%..... | 12,901 |
| | $ 98,912 |

LEVEES.

| | | |
|---|---|---|
| California Side 644,557 C. Y. plus 10% for shrinkage, equals 709,000 C. Y. at 12¢ | $85,080 | |
| 15 miles of cleaning, at $270. (18 ac. x $15.) | 4,050 | $ 89,130 |
| Arizona side, Colorado River levees above Yuma 412,561 C. Y. plus 10% for shrinkage, 453,817 C. Y., at 12¢ | 54,458 | |
| Gila River levees, 859,382 C. Y. plus 10% for shrinkage, 945,320 C. Y., at 12¢ | 113,438 | |
| Cleaning Arizona side above Yuma, 21 mi. at $135.00 | 2,835 | $ 170,731 |
| Below Yuma, 864,847 C. Y. plus 10% for shrinkage, 951,332, at 12¢ | 114,160 | |
| Cleaning Arizona side below Yuma 25 mi. at $270.00 | 6,750 | $ 120,910 |
| | | $ 380,771 |
| Engineering & Contingencies 15% | | 57,116 |
| | | $ 437,887 |

[144]

PUMPING PLANTS FOR DRAINAGE & IRRIGATION.

SUMMARY.

| | | |
|---|---|---|
| Power Plant, | | $25,000 |
| Drainage Pumping Plant No. 1, | $ 7,500 | |
| " " " No. 2, | 11,000 | |
| " " " No. 3, | 16,000 | |
| Irrigation " " No. 4, | 5,000 | |
| " " " No. 5, | 6,000 | |
| " " " No. 6, | 6,500 | |
| | | $52,000 |
| | | $77,000 |

| | | |
|---|---|---|
| 21 miles pole line complete, in place..... | | 6,500 |
| 2 River crossings, ..... | | 4,000 |
| Wire for 21 miles of line..... | | 10,500 |
| | | $100,000 |
| Power plant building & sluiceways.....$ | 6,000 | |
| 6 Pumping stations, ..... .. | 18,000 | 24,000 |
| Grand total..... | | $124,000 |
| The distribution system is now partially provided, and it is estimated that it can be completed for ..... ..... | | $130,000 |

To these estimates should be added the cost of right of way for canals, levees, power and pumping plants, and the rectification of the Gila and Colorado Rivers, items which it is not possible to closely estimate at present, but which should not seriously increase the acreage cost. [145]

COLORADO RIVER. YUMA PROJECT.

Preliminary estimate March 1904.

For Laguna dam site low line canal in California and Arizona.

| | | |
|---|---|---|
| Laguna Weir—Indian type (page 2)....$ | 972,455 | |
| California Canal (page 11) ..... | 87,422 | |
| Arizona Canal (page 12) Above Yuma... | 761,717 | |
| Arizona Canal (page 15) Below Yuma.... | 186,751 | |
| Arizona Canal (page 14) Gila Crossing... | 262,969 | |
| Levees—California side page 22.... | 89,130 | |
| Arizona side above Yuma... | 170,731 | |
| Arizona side below Yuma... | 120,910 | |
| Engineering & contingencies..... | 57,116 | 437,887 |
| Pumping plant for irrigation & drainage.. (page 24) | 124,000 | |
| Drainage system (page 22) ..... | 98,912 | $2,932,113 |

Net area irrigable in Yuma Project 87,449 acres.

Rate per acre.....$33,42.

ADDITIONAL ESTIMATES.

| | |
|---|---|
| Dam side #3 Low Level Canal Head Works Indian weir type | 918,821 |
| Laguna weir-hollow concrete steel type on pavement | 1,331,628 |
| Laguna weir-hollow concrete steel type on piles | 1,365,646 |
| Rock fill dam site No. 3 | 938,547 |
| Laguna weir solid rubble on pavement | 1,053,293 |
| Canals from dam site to Laguna, Arizona side— | |
| Canals Dam Site to Laguna, Calif. side. | |
| Canals from Laguna to Dam site No. 3. | |
| Cal. side 131,000 C. Y. at 12¢ | 15,720 |
| Arizona side 535,000 C. Y. at 12¢ | 64,200 |
| | 79,920 |
| Engineering ans contingencies 10% | 7,992 |
| | $ 87,912 |

(Signed) A. R. Davis, (Signed) W. H. Sanders,
(Signed) B. M. Hall, (Signed) C. Y. Wisner,
(Signed) H. N. Savage, (Signed) J. H. Quinton,
(Board of Engineers) [146]

Plaintiffs offered as their Exhibit 3 (subject to the same objection, the ruling on which was also withheld) an exemplified copy of a communication in connection with the Yuma project and the cost thereof, and the estimate of cost thereon, from Charles D. Wolcott, Director of the Geological Survey, under date of May 9, 1904, as follows:

**Plaintiffs' Exhibit No. 3.**

"In reply please refer to F. H. N. and date of this letter.

Address all communications to
Director, U. S. Geological Survey,
Washington, D. C. E. D. W.

Subject: Yuma project, Cal.

DEPARTMENT OF THE INTERIOR
United States Geological Survey
Washington, D. C., May 9, 1904.

The Honorable,
The Secretary of the Interior,
Washington, D. C.

Sir:

In the act making appropriation for the current and contingent expenses of the Indian Department, Public—No. 125, approved April 21, 1904, sec. 25 is stated as follows:

The Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations, etc.

There have already been carried on under authority of the Reclamation Act of June 17, 1902 and under instruction from you extensive surveys and examinations as to the possibility of diverting the waters of Colorado River. A preliminary report has been prepared by Mr. J. B. Lippincott, supervising engineer, and submitted to the Chief Engineer. This in turn has been referred to a board

of engineers consisting of Messrs. Arthur P. Davis, H. N. Savage, W. H. Sanders, B. M. Hall, Geo. Y. Wisner and J. H. Quinton.

In general the reports indicate that by means of construction of a dam across Colorado River and other works, it will be possible to reclaim upwards of 85,000 acres of land at a cost of less than $40 per acre. Much of this land, outside the Indian reservations is in private ownership and the feasibility of the project will depend largely upon the owners of the land uniting in a satisfactory form of organization under the terms and condition of the Reclamation Law.

The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is believed that the cost of $40 per acre is not prohibitive.

There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending.

Recommendations.

In view of the present condition of knowledge of the Project I respectfully recommend that the sum of $3,000,000 be set aside of the reclamation fund, for the construction of the Yuma project subject to

the satisfactory adjustment of various matters pertaining to land and water titles and to structural features.

Very respectfully,

CHAS. D. WALCOTT,

Director. F. H. N." [147]

(DULY EXEMPLIFIED.)

Thereupon Plaintiffs introduced, subject to the same objection, a duly exemplified copy from the office of the Secretary of the Interior of a communication in response to the last exhibit from E. A. Hitchcock, Secretary of the Interior of the United States of America, purporting to fix and estimate the cost, determine the charge on the Yuma project at less than $40 per acre, and setting aside for the construction of said project the sum of $3,000,000, as follows.

**Plaintiffs' Exhibit No. 4.**

"May 10, 1904.

The Director of the Geological Survey.

Sir:

In a letter of the 9th inst. to the Department you referred to the Act of April 21, 1904,—Public, No. 125—which has authorized the Secretary of the Interior "to divert the waters of the Colorado River and to reclaim, utilize and dispose of any lands in said reservations," etc., and have referred to the surveys which have already been carried on under the Act of June 17, 1902—32 Stat. 388—and to the reports submitted by the engineers.

It appears that under the Yuma project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of less than $40 per acre.

You have stated that much of this land, outside of the Indian Reservation, is in private ownership, and that the feasibility of the project will depend largely on the owners of the land uniting in a satisfactory form of organization under the terms and conditions of the reclamation law.

Your recommendation is that the sum of $3,000,000 be set aside from the reclamation fund for the construction of the Yuma project, subject to the satisfactory adustment of the various matters pertaining to land and water titles and to structural features.

In compliance with your recommendation, I hereby set aside the sum of $3,000,000, or so much thereof as may be necessary, from the fund provided by the Act mentioned, for the construction of the Yuma Project, under the conditions you have set forth.

Yours respectfully,

E. A. HITCHCOCK,

Secretary." [148]

Thereupon the plaintiffs introduced, without objection, nine certain plats, as plaintiffs' Exhibits 5 to 13, inclusive, duly certified by the Registrar of the Land Office at Phoenix, Arizona, showing the status of the lands in the Lower Colorado Irirgation District, mentioned in the Articles of Incorporation,

(Plaintiffs' Exhibit No. 1), and the complaint, constituting the only part of the Yuma project involved in the controversy in this suit; as to whether or not said lands were in private ownership on May 10, 1904.

The originals of these maps have, by the order of this court, been directed to be transmitted to the Circuit Court of Appeals for inspection by that court, and are therefore not set forth here.

Mr. MOLLOY.—If the Court please, plaintiffs desire to introduce in evidence certain excerpts from the Third Annual Report of the Reclamation Service; it being the report of the Secretary of the Interior to the Congress of the United States, required by the Reclamation Act, and I wish, of course, to offer the whole book but not all that is in it. There are certain excerpts, certain portions of it dealing with the interpretation of the Reclamation Act in general and the Yuma project in particular, and all of the portion of the book referring to the Yuma project—for the purpose of enlightening the Court as to the interpretation placed upon the Reclamation Act, and particularly section 4 thereof, which is the crucial point in this case. The particular object is to show that the Secretary of the Interior, acting under the provisions of the Reclamation Act, made an estimate of the cost of the Yuma project prior to the date of this report.

Mr. KING.—If the Court please, if I may be permitted to make a suggestion, I think the Court may take judicial notice of any of these public documents,

and it might save much time of the Court that they merely be referred to in the argument. I am willing to concede that the Court may take judicial notice of all these public documents, and much time [149] might be saved in introducing them in evidence under that suggestion.

The COURT.—The only difficulty is that when I come to consider the case after it is taken under advisement, unless there is some record made of it at the time so that I might identify it I might overlook it. In other words, if it is to be considered as evidence, as in evidence, or if the Court may take judicial notice of it, unless I had some memorandum made I might forget where to look for it.

Mr. KING.—I assume that the memorandum might be made during the progress of the trial or in the argument.

The COURT.—Very well.

Mr. MOLLOY.—With that understanding, your Honor, we will not at this time offer the public documents and encumber the record with them. I think it is a good suggestion.

Mr. KING.—I don't mean by that that we waive the right to object to their materiality.

The COURT.—I understand, but do you mean to include in that also any reports that may have been made and filed in any of the departments?

Mr. KING.—And report that has been made and published as a public document, a report to Congress for example.

The COURT.—Well, then, the published documents.

Mr. KING.—Would refer to the published reports of the department. I think the court has the same right to take judicial notice of it as it would of the laws or reports of courts, etc. I think that will save time.

The COURT.—That will save much time. There is no doubt about that.

Mr. MORTON.—As to the annual reports, my understanding is that you are to give the court merely references to those and we need not introduce them.

Mr. KING.—That is, the published public documents.

Mr. MOLLOY.—Yes, I mean that, of course. [150]

Mr. MORTON.—Of course, they are subject to the same objections as to competency, immateriality and relevancy as the other matters.

The COURT.—Do I understand that you gentlemen are now agreeing that the Court may consider those as evidence on the part of the plaintiff, without objection?

Mr. MORTON.—Oh, no, if your Honor please, not at all: My understanding of the matter is this: that as to their being reports from the officials, which they purport to be, and as to their being a public document, that they are authentic and are conceded to be so, and the court can take judicial knowledge of the contents thereof, but, of course, we would not wish in any sense to concede that the matters contained therein are competent, relevant or material as evidence in the particular matter that is now be-

fore your Honor. We are merely attempting to save the time of the court in the matter of a mass of exhibits.

The COURT.—In other words, you reserve your right to object to them, or any of them, because of the fact that they are irrelevant, incompetent and immaterial?

Mr. MORTON.—Yes, and that will be brought out in the argument upon the general objections.

* * * * * * * * *

The COURT.—No objection is made as to their genuineness.

Mr. KING.—We merely want to waive the formality of having them introduced and read into the record which will require a great deal of time, but we will insist upon the fact, at the proper time, or the objection, rather, that they are not competent as evidence in the case under the pleadings and under the showing that will eventually be made.

The COURT.—In the event that you desire to take an appeal in this case are they to be incorporated in the record?

Mr. KING.—Well, we will have no objection to them incorporating them in the record, but I see no more necessity to incorporate them in the record than to incorporate a decision [151] of a court or any other public document. It is merely a matter of convenience, of saving time. It will require a great deal of time and an immense record to read all this into the record, and as long as they are printed anyway the court may take judicial knowl-

edge of it, which I think is well settled by the decisions. There is no occasion to go through the formality of introducing them, and we will waive that formality, but we insist that they are not competent or material under the issues in the case.

In pursuance of the foregoing plaintiffs submitted to the Court with their brief, which at the close of the trial was directed to be filed within thirty days thereafter, the annual reports of the U. S. Reclamation Service, from the first to the sixteenth, inclusive, made by the Secretary of the Interior to the Congress of the United States, in accordance with the Reclamation Act, from December, 1902, until December, 1917, inclusive, and which were referred to in said brief as Plaintiffs' Exhibits 35 to 50, inclusive, and also five other public documents, to wit: Report of the Senate Committee on Public Lands; Report of House Committee on Irrigation of Arid Lands, #1468; Report of the Board of Army Engineers, #1262; Pamphlet on Organization of Water Users' Association by U. S. Geological Survey; and General Map of the Yuma Project, #4611, and which were referred to in plaintiffs' brief as Plaintiffs' Exhibits 51 to 55, inclusive, and excerpts therefrom set forth in plaintiffs' brief.

All of the foregoing mentioned public documents have, by order of this court, been directed to be transmitted to the Circuit Court of Appeals, for inspection by that court, and are, therefore, not set forth here. [152]

It was also stipulated between the parties hereto

that either party in their respective briefs filed with the Judge of the Trial Court, or with the U. S. Circuit Court of Appeals, in the event of their being an appeal, might set forth in their brief any portion of the foregoing mentioned public documents deemed by either of them to sustain their respective contentions on the issues herein with like force and effect as if the same were incorporated in the record at length.

Thereupon the plaintiff introduced, without objection, a sample form of the contract or agreement required to be entered into by the constitutent members of the plaintiff corporation in connection with the Yuma Project, and for the purpose of securing [153] the cost thereof to the United States of America as provided by the articles of incorporation.

Mr. MOLLOY.—I will make the explanatory statement that it is a true copy of all the documents of this kind signed by each and all of the constituent members with the exception it has got a blank for the name of the subscriber and the owner of the land, of course, and a blank for the number of shares, and then a blank for the description of the land other than "G. & S. R. Meridian, Yuma County, Arizona, containing 160 acres," which would not apply, of course, to a small tract of land in the San Bernardino Meridian.

The COURT.—Well, it applies to all stockholders except those in that San Bernardino Meridian?

Mr. MOLLOY.—Yes, and then only as to the de-

scription of the township and range and the meridian. * * * and there is another blank showing that the subscriber's wife may join with him, and a blank for the date, blank for the signature and a blank for the acknowledgment.

The COURT.—There being no objection it may be admitted.

Which exhibit is as follows:

**Plaintiffs' Exhibit No. 14.**

AGREEMENT.

Know all men by these Presents: That I, ———, do hereby subscribe for and agree to take —— shares of the Capital stock of the Yuma County Water Users' Association, a corporation organized under the laws of the Territory of Arizona, and for that purpose, and in order to become a member of said Association, do hereby, subject to all the provisions thereof and of the by-laws of said Association, not inconsistent therewith, subscribe to the Articles of Incorporation of said Association as they appear in full in Book 1 of Articles of Incorporation, page 325 et seq., records of the Recorder's Office, Yuma County, Arizona, and the said record is hereby referred to and made a part thereof, and my signature hereto shall have the same force and effect as though the said Articles were in fact a part thereof, and were printed in full as a part hereof above my said signature. And I hereby agree to subscribe to said Articles, or a copy thereof upon request of said Association.

The said shares of stock and all rights and interests represented thereby, or existing or accruing by reason thereof, or incident thereto, are to be inseparably appurtenant to the following described real estate: ————————, Gila and S. R. Mer., in Yuma County, Arizona, containing —— acres and no more, of which I am the owner (or occupant having initiated right to acquire the same).

———————— joins in, and agrees to be bound hereby.

————————,

————————.

Dated: ————.

Acknowledged ————. [154]

Mr. MOLLOY.—At this time we will introduce as Plaintiffs' Exhibit 15 a copy of a certain pamphlet purporting on its face to be a letter from the chief engineer of the United States Geological Survey relative to the irrigation of lands in the vicinity of Yuma under the provisions of the Reclamation Act of June 17, 1902, and containing in it a letter of May 3, 1904, from M. Winsor, the president of the plaintiff corporation, to the Secretary of the Interior, and in response thereto, dated at Washington, D. C., on May 16, 1904, by F. H. Newell, Chief Engineer of the Reclamation Service, in which there is incorporated a copy of the Secretary's communication to the Director of the Geological Survey already offered in this case as Plaintiffs' Exhibit 4, together with a certain map and certain plans on

the back thereof. And we offer it upon the theory that it constituted, in the manner in which it was circulated, public notice under the provisions of Section 4 of the Reclamation Act, noticing the things required by that act.

Mr. MORTON.—Our general objection, of course, will go to this as to the other matters, but this document purports to be some printed affair, a copy of something else. It is surely not the best evidence and it is incompetent.

Mr. MOLLOY.—I am offering it as an original of the public notice.

The COURT.—By whom was that printed and published?

Mr. MOLLOY.—By the chief officers of the Reclamation Service, particularly by Mr. Lippincott named in the complaint as supervising engineer of the Reclamation Service, and as we contend, under, by and with the authority of the Secretary of the Interior.

Mr. MORTON.—It is objected to on the ground that it is incompetent and not the best evidence, and also on the ground of its materiality and relevancy. It is one of the matters that can well be discussed in connection with the three or four others that I hope your Honor will hear us on soon, as [155] soon as the documentary evidence has been introduced. It might be regarded as offered subject to those objections just as the other three documents were.

The COURT.—Now, do I understand, Mr. Mol-

loy, that you offer this document in order to get before the Court a copy of the letters therein set forth, or have you the letters copied therein already introduced?

Mr. MOLLOY.—Only one of them, if the Court please. We are offering the document itself as being one of a thousand that were circulated and as we contend in this case constituting public notice, the public notice that I just referred to, required by Section 4 of the Reclamation Act.

The COURT.—And as binding upon the Government as to the estimated cost of the work?

Mr. MOLLOY.—As to the estimated cost, and particularly as showing the inducement that was held forth to plaintiffs in this case, that is, the plaintiffs who are constituent members of the Yuma County Water Users' Association. And I would say this for Mr. Morton's information: it would be impossible to treat this document fairly as a piece of evidence on an argument for its rejection on any ground whatever unless we hear the oral testimony in connection with it, and I will say further that a very large portion of our case, and in fact, all of our case, substantially all of our case that will require oral testimony will revolve around this very document. So that any argument that counsel on the other side would make in reference to this would be premature, as we see it, at this time.

The COURT.—You prefer, then, not to introduce it as a part of the documentary evidence in the case until later?

Mr. MOLLOY.—I would have preferred to introduce certain oral testimony that will show to the Court the competency and the admissibility of the instrument.

The COURT.—Well, then, you may withdraw your offer of the document at the present time and introduce it at such [156] time as you may think proper.

Mr. MOLLOY.—We would like to have it marked Plaintiff's Exhibit 15 for Identification.

The COURT.—It may be so marked.

Thereupon plaintiffs' exhibit was offered in evidence subject to the objections, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 15.**

YUMA COUNTY WATER USERS' ASSOCIATION.

Yuma, Arizona, May 3, 1904.

To The Honorable E. A. Hitchcock,
Secretary of The Interior,
Washington, D. C.

As the work of investigating the conditions along the lower Colorado River and preparing plans for irrigation works has been completed by the members of the United States Geological Survey detailed for that purpose, and their work has been examined by the final Board of Consulting Engineers, and, as we understand, a favorable report made to your Department, therefore, it is deemed proper by the Board of Governors of the Yuma County Water

Users' Association, a body legally organized under the laws of the Territory of Arizona for the purpose of securing the irrigation of lands in the valley of the Colorado River in Yuma County, Arizona, by the Government, under the law commonly known as the Reclamation Act, to take the following action:

1. To submit to you a certified copy of the Articles of Incorporation of the Yuma County Water Users' Association for your inspection.

2. To furnish you with the names and credentials of the President, Secretary and Board of Govenors of the Association.

3. To convey to you the earnest desire and request of this Association, by its Board of Governors, for the construction of irrigation works on the lower Colorado River, and to pray you to furnish to the people of this section, through this Association, a statement of the character and costs of the said proposed irrigation works, with instructions as to how we shall proceed in order to do our part in securing the construction of the same.

4. To assure you, by a petition numerously signed, and by other means, of the almost unanimous desire of the people here for the construction of irrigation works as planned.

Therefore, in accordance with the foregoing action of the Board of Governors, I have the honor to transmit herewith a certified copy of the Articles of Incorporation of the Yuma County Water Users' Association; the attested credentials of its officers;

a petition signed by the members of the Board of Governors, praying for the construction of irrigation works on the lower Colorado by the Government, and for information and instruction for the guidance of said Board; a petition of like nature, signed by a large number of the leading farmers and land owners of this section; a resolution passed by the City Council of the town of Yuma, and one by the Yuma Board of Trade, which is composed of over 200 members, many of them farmers.

All of which is most respectfully submitted.

(Signed) M. WINSOR,
President. [157]

DEPARTMENT OF THE INTERIOR.
UNITED STATES GEOLOGICAL SURVEY.
HYDROGRAPHIC BRANCH.

Washington, D. C.
May 16, 1904.

Yuma County Water Users' Association,
M. Winsor, President,
Yuma, Arizona,

Gentlemen:—

Your communication of May 3d, 1904, accompanied by petition under same date, and also certification of officers of the Yuma County Water Users' Association, is hereby acknowledged. The Chief Engineer of the United States Geological Survey will meet your officials at Yuma, May 27th next, to con-

fer with them concernin*t* such matters as you may present relative to your organization.

In reply to your request for information as to cost and character of works projected for your locality, the following general statement is presented. The Secretary reserves the right to make such revisions in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare.

During the winter season of 1903–4 the Reclamation Service made surveys for the irrigation of the valley lands of Colorado and Gila Rivers in the immediate vicinity of Yuma, Arizona, and in the Yuma Indian Reservation in California, looking towards the utilization of the Colorado River for their water supply. These surveys included the making of a topographic map of the scale of 100 feet to the inch at the Laguna Dam Site, and soundings for bedrock and foundations at that point. On the California side of the river, along the route to be occupied by a possible canal, a map has been made on the scale of 100 feet to the inch, with a small contour interval. On the Arizona side of the river a map has been made, on the scale of 100 feet to the inch, from the Laguna Dam Site to Yuma along the canal line, and in addition a number of angle line surveys have been run for the exact determination of the location for the canal. Below Yuma, transit surveys have been made for the location of the canal. At the crossing of the Gila River a map has been drawn on a scale of 100 feet

to the inch, and soundings made for bedrock. Preliminary location surveys have been made for a complete set of levees from the Laguna Dam Site to the Mexican line, on both sides of the Colorado River, and also on each side of the Gila River.

A drainage system has been projected upon the topographic maps which have been made of the entire district to an elevation of 150 feet above river level, and to the scale of 2 inches to the mile. Surveys have been made to base estimates upon for pumping plants for irrigation and drainage. Mr. H. A. Storrs, Consulting Electrical and Mechanical Engineer, has examined the ground and made plans and estimates therefor.

A Board of six Consulting Engineers has been through the estimates of the Engineers in charge in detail, and the report which is submitted is the result of the deliberations and best judgment of all these men, and all estimates and plans have been brought to the complete satisfaction of each person. [158]

AREAS.

In the Yuma Indian Reservation on the California side of the river it is estimated that there will be within the levees 16,000 acres, and on the Arizona side it is estimated there will be 91,000 acres under the system, making a total of 107,000 acres. Of this area it is estimated that 5,000 acres next to the Mexican line in Arizona will be subject to overflow in such a way as to temporarily exclude them from the irrigable areas, and in ad-

dition a small percentage of the remaining lands are known to be in sand dunnes that will be above the level of the canal lines. In all it is estimated that on both sides of the river there will be a total of 86,700 acres of irrigable land, of which 73,100 acres are in Arizona. The water supply of the Colorado River is adequate for the irrigation of this area.

HEAD WORKS.

A number of different designs for the diversion weir have been estimated upon in the study for the most economical type that may be built in safety at this point. Several different locations have also been examined to determine the best place for this structure, bedrock having been explored for with diamond core drilling machinery at all possible dam sites between Yuma and Picacho. As a result of these explorations the Laguna weir site has been selected as the most desirable one for the construction of a weir to serve the lands near Yuma, a high dam and high line canal being considered impossible. The type of weir selected is one that has been tried during the last 50 years at numerous places in India and Eygpt under similar conditions, 3 dams having been constructed on the Nile River within the past 15 years, on practically this same plan, all having served their purpose efficiently and being in operation today. This type of weir consists of a loose rock structure with a paving of stones 1½ feet in thickness on the down-stream slope, the structure being tied together with three

parallel walls of steel and concrete run longitudinally between the granite abutments on the two sides of the river, and the entire structure being further made secure by an apron of loose rock pitching 10′ in thickness and 50′ in width at the lower toe of the dam below the sloping pavement. The height of this weir is to be 10′ above low-water and the slope of the downstream side is 12′ horizontal to 1′ vertical with the 50′ apron below. The design calls for the upper core wall of concrete to rest upon a row of sheet piling driven into the bed of the river.

The handling of the silt of the Colorado is one of the most difficult features of this undertaking. It is known that its amount is very large. The river is on a grade of approximately one foot to the mile above Laguna weir site, so that this weir 10′ high will make a settling basin of relatively quiet water approximately 10 miles in length above it. At each end of the weir and constructed in solid granite rock, will be a sluice way 200 feet wide and excavated to the depth of low water in the river. These sluice ways will be closed by large gates operated by hydraulic machinery. The diversion canals will take their water above these gates from the sides of the sluice ways. The area of these sluice ways being so great, the water movement towards the canal will be slow, and most of the sediment will be deposited before reaching the canal intake. When this has accumulated to a considerable extent, the sluice gates will be opened, and it

is estimated that their capacity will be approximately 20,000 cubic feet per second each. This great volume of water passing through the sluice ways, when the gates are opened, will carry out with it the sediment deposited above the intake of the canal. The ordinary low stage flow of the Colorado River is from 3,500 to 4,000 cubic feet per second, so the capacity of each of these sluice ways will be about five times the low water flow of the river. These figures are given for purposes of comparison only. As the result of a number of experiments, it has been found that the principal quantity of silt is carried along [159] near the bottom of the river, and that the surface water is relatively free from sediment. It is planned, therefore, to take the water into the canals by a skimming process over a long row of flashboards, so that the entire capacity of the canal can be furnished by drawing but one foot in depth of water from the surface of the river. As a still further precaution, it is proposed to construct the first 3,000 feet of canal on each side of the river of such size that the movement of water through it will be slower than one foot per second. These settling basins, as they are called, would be either excavated from granite, or where the section is in earth they would be paved. At the lower end of these settling basins, gates will be arranged to discharge into the river, so that the water can be drawn down to the level of the stream, and a grade of 11 feet in 3,000 feet thus obtained. At the lower end of these settling basins the canals

proper will begin. The silt that will enter the settling basins in spite of the two precautions noted above, will be permitted to settle in these basins, and at such intervals of time as may be necessary the sluice gates at the end of the settling basin will be opened and sufficient water drawn into this section through the headworks to scour it out. Every portion of this weir and headworks as designed would be of rock, concrete or steel, with the exception of the sheet piling, which will be driven entirely below the water level, and so will not decay. Every portion of the weir will be what is known as permanent construction. Such character of work will, of course, be expensive, but it has been proved to be sound economy to build in this way.

The capacity of these canals at their intakes will be 1,200 cubic feet per second on the Arizona side, and 200 cubic feet per second on the California side. The amount of silt that would be daily delivered into the Arizona canal, if diversions were not made directly from the stream, would approximate 17,000 cubic yards of wet mud by volume. It is not believed to be possible for a canal to continuously operate successfully for the irrigation of lands along the valleys of the Colorado River, unless some very substantial arrangements are made at the headworks for the handling of silt, and this is believed to be a justification for the expenditure proposed for these headwork; also the water must be held to a fixed level at the canal heading for all stages of the river. This structure will cost approximately $1,000,000.

CANALS.

Careful study has been made of the existing canals in the vicinity of Yuma and Imperial to determine the shape that they naturally assume, and the roughness of the bottom and sides, which tends to retard the velocity. Based upon this data, the canals have been designed so that they will carry water at a higher velocity throughout than will be found in the settling basins above their head, and of such velocity as will permit of a minimum loss by seepage and evaporation. The gates and drops of these canals, and the Yuma bridges are designed as steel concrete structures. A distribution system has been estimated upon to furnish water to each 160-acre tract. There will be small areas of land in the upper Gila Valley, and below Yuma that will have to be served by pumping plants that will lift the water from 5 to 7 feet. The power for doing this will be furnished from a water power plant to be erected above Yuma at a drop in the main canal. This power plant will also be used in connection with the drainage system.

GILA CROSSING.

One of the most difficult problems in connection with this project is the crossing of the Gila River. It has been considered necessary to make this perfectly safe, and for this purpose a structure has been designed that will cross beneath the bed of the [160] river, the top to be several feet below the lowest point of the stream bed. This structure will be of steel and concrete, some 3,300 feet in length.

LEVEES.

Because of the annual rise of the Colorado River, a large portion of the lands along this stream are subject to annual overflow which practically prevents residence thereon, as well as the farming of them without protective works. The levee, therefore, is considered an essential feature of the enterprise. The shape of levee adopted is one that has been developed by years of experience along the Mississippi River. It will have a slope of 3 feet horizontal for 1 foot vertical on the water side, and 2½ feet horizontal to 1 foot vertical on the land side; it will be 8 feet wide on top, and be built 5 feet above the highest water-marks of the year 1903. These levees will be 4,000 feet apart (one on each side) along the Colorado River, and 3,200 feet apart along the Gila River.

DRAINAGE SYSTEMS.

Because these lands are so flat, and the level of the water in the ground so near the surface, it is considered necessary for their permanent safe irrigation, to supply a drainage system. A main drainage canal has been designed to run through the central portion of the areas to be irrigated, and when possible the natural drainage lines of the country will be utilized, deepening them with a steam dredger to such depth that they will carry off the water returning or seeping through the levees during the high-water stage of the river.

When lands in any district tend to become alkaline they may be connected, by means of local drain-

age canals, with this main drain, and in this manner they could be kept free from alkali by holding down the level of the ground water. During the greater portion of the year when the river is low, this drainage water would be discharged into the stream, but when the river is in flood its elevation will be such as to prevent a discharge into it from the drains. A pumping plant has therefore been designed to lift the drainage water over the levees during the flood period of the river to prevent the lands becoming water-logged.

SUMMARY.

The whole system, as planned above, is one looking to the permanent reclamation of this district by means of irrigation, levee and drainage works. All portion of the system to be made of steel, concrete or earthwork.

The reports of the Department of Agriculture on the character of the soils of this valley, as well as past farming experience indicate that they are exceedingly fertile. The silt of the Colorado River, all of which cannot be removed at the headworks, has high fertilizing properties. Under these conditions and with proper handling of the system, the valley should be perpetually fertile. The entire cost of this enterprise, providing all the area is irrigated which is indicated above, will amount, according to the estimate, to about $35.00 per acre irrigated. It is entirely possible however, that as this construction work proceeds this cost may be somewhat increased or lessened, although an effort has

been made to cover all contingencies, and the estimates of cost have been liberal. The price will range near $35.00 per acre, this to be paid for according to the provisions of the Reclamation Act and regulations of the Secretary of the Interior, in ten annual [161] installments after the first delivery of water. The annual charge for maintenance and supervision of this system will be very low and probably materially less than $1.00 per acre. There will be no charge for interest, profit or taxes.

In order to keep the price as low as that estimated upon and to proceed with the construction of the works, it will be necessary for all of the land owners of the portion of the district that is in Arizona, under the projected canal, to enter into an agreement with the Secretary of the Interior through their local Water Users' Association for the payment of the water when it is delivered to them. The Reclamation Service has made the surveys and estimates required for the Secretary of the Interior concerning the costs and character of these works, but it will be absolutely necessary for the local land owners to submit to the Secretary, their local associations, the contracts for the acceptance of the water; and also to provide for the rights of way required for the levee, power plants, transmission lines, etc. When these contracts and agreements have been prepared they will be given careful consideration by the Department.

The Secretary of the Interior has set aside $3,000,000 of the reclamation fund for the construc-

tion of this project, contingent upon the action of the land owners of this valley and their entering into contracts with the Department in accordance with the provisions of the Reclamation Act passed June 17, 1902, as indicated by the following letter:

May 10, 1904.

The Director of The
Geological Survey.

Sir:

In a letter of the 9th inst. to the Department you referred to the Act of April 21, 1904,—Public, No. 125—which has authorized the Secretary of the Interior to "divert the waters of the Colorado River and to reclaim, utilize and dispose of any lands in said reservation," etc., and have referred to the surveys which have already been carried on under Act of June 17, 1902—32 Stat. 388 and to the reports submitted by the engineers.

It appears that under the Yuma project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of less than $40 per acre.

You have stated that much of this land, outside of the Indian Reservation, is in private ownership, and that the feasibility of the project will depend largely on the owners of the land uniting in a satisfactory form of organization under the terms and conditions of the reclamation law.

Your recommendation is that the sum of $3,000,000 be set aside from the reclamation fund for the construction of the Yuma project, subject

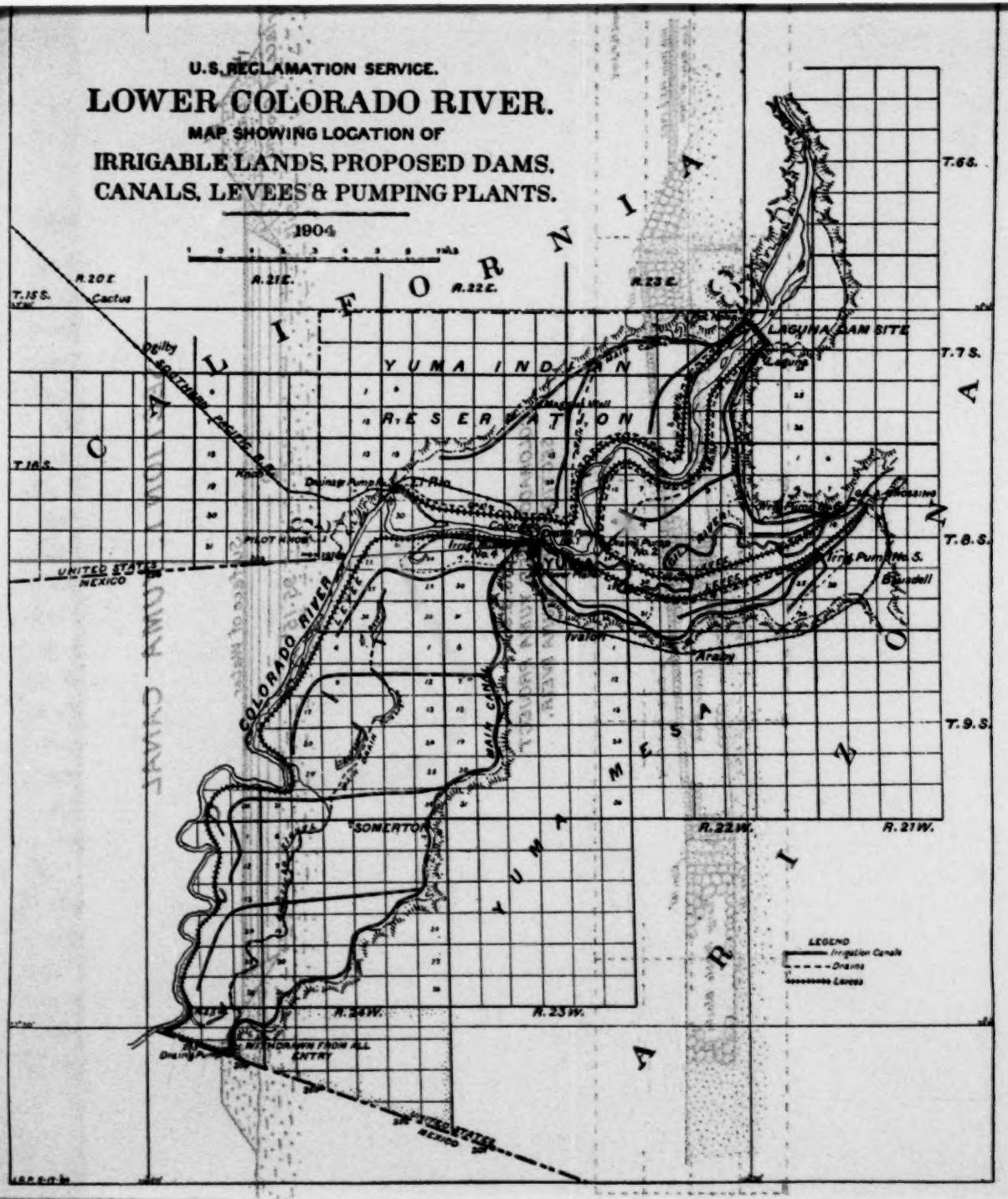
to the satisfactory adjustment of the various matters pertaining to land and water titles and to structural features.

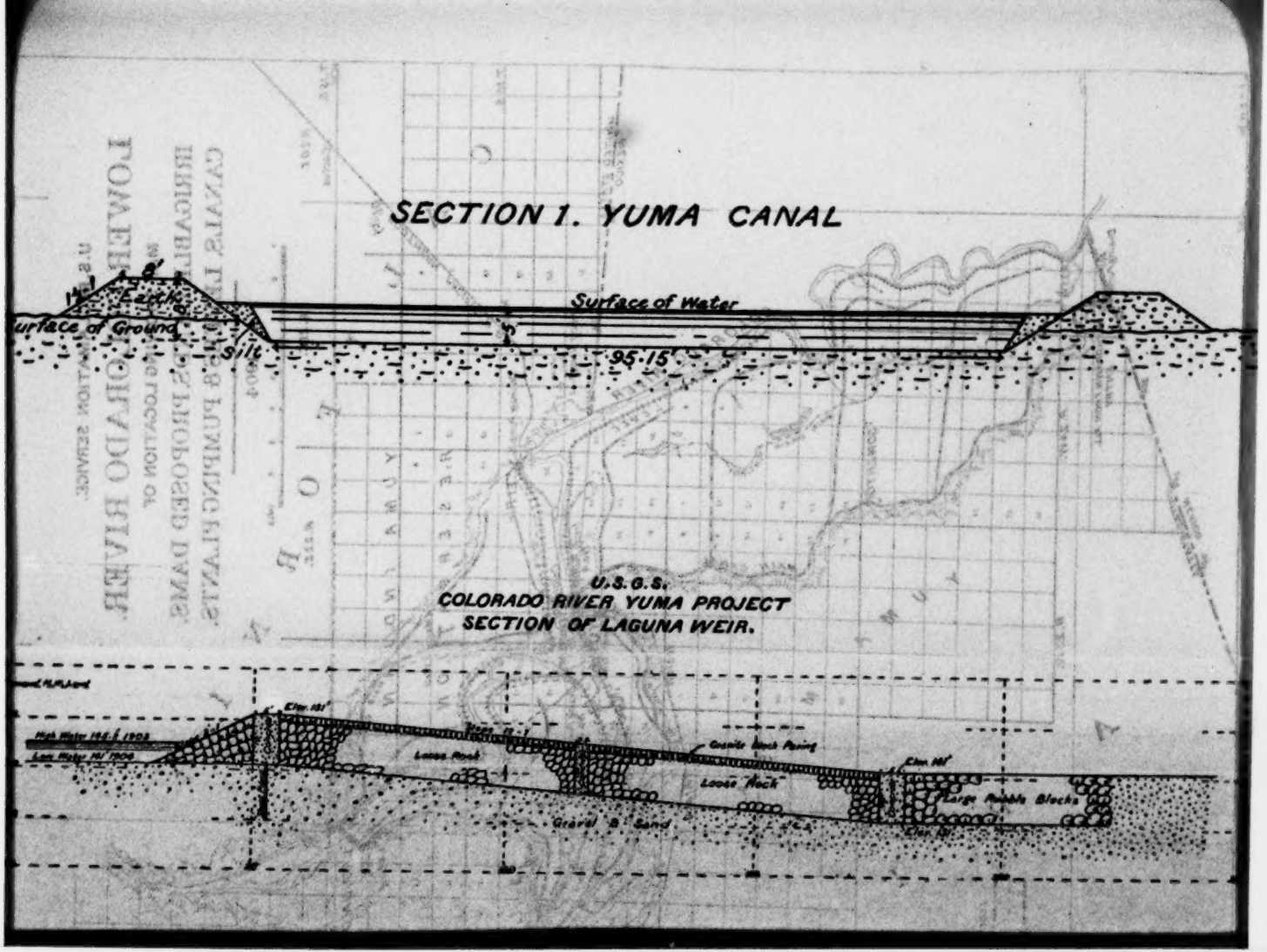
In compliance with your recommendation, I hereby set aside the sum of $3,000,000, or so much thereof as may be necessary, from the fund provided by the Act mentioned, for the construction of the Yuma project, under the conditions you have set forth.

Yours respectfully,

(Signed) E. A. HITCHCOCK,
Secretary.

F. H. NEWELL,
Chief Engineer. [162]


U.S. RECLAMATION SERVICE.
LOWER COLORADO RIVER.
MAP SHOWING LOCATION OF
IRRIGABLE LANDS, PROPOSED DAMS,
CANALS, LEVEES & PUMPING PLANTS.
1904
CALIFORNIA
ARIZONA
YUMA INDIAN RESERVATION
LAGUNA DAM SITE
Laguna
Gila Crossing
Gila Pump No. 5
Bensdell
Araby
Somerton
Yuma
Pilot Knob
Drainage Pump No. 1
Drainage Pump No. 2
Drainage Pump No. 3
Drainage Pump No. 4
Drainage Pump No. 5
Colorado River Levee
Main Canal
Gila Gravity Main Canal
Gila Gravity Drain
Yuma Mesa Drain
Yuma Mesa Canal
Yuma Mesa Levee
Yuma Mesa Pumping Plant No. 1
Yuma Mesa Pumping Plant No. 2
Yuma Mesa Pumping Plant No. 3
Yuma Mesa Pumping Plant No. 4
Yuma Mesa Pumping Plant No. 5
Yuma Mesa Pumping Plant No. 6
Yuma Mesa Pumping Plant No.


SECTION 1. YUMA CANAL
Earth
Surface of Water
Surface of Ground
Silt
95.15'
U.S.G.S.
COLORADO RIVER YUMA PROJECT
SECTION OF LAGUNA WEIR.
Loose Rock
Granite Block Paving
Loose Rock
Large Rubble Blocks
Gravel & Sand

Thereupon OSCAR P. BONDESSON was called as a witness in behalf of the plaintiffs, duly sworn, examined by Mr. Molloy:

**Testimony of Oscar P. Bondesson, for Plaintiffs.**

My name is Oscar P. Bondesson, and I am a constituent member of the Yuma County Water Users' Association. I reside in Yuma County, Arizona, and resided therein the early part of 1904, and was then a constituent member of said association, and the owner of tracts of land in the Lower Colorado River Irrigation District mentioned in the pleadings, the same being a part of the Yuma project of the U. S. Reclamation Service, and at that time I was Secretary of the said association, having been elected in 1903 and serving until the fall of 1904. I was thereafter president of said association in the years 1907, 1908 and part of 1909.

Q. Now, what negotiations, if any, did you have with the Secretary of the Interior or anyone representing him, such as the chief engineer of the U. S. Reclamation Service, or any supervising engineer in charge of the Yuma project in connection with the starting of the project there?

Mr. MORTON.—We object to the inquiry as to the negotiations, as calling for the conclusion of the witness in one particular, and also as it does not state—the question does not state at what time. If these negotiations occurred prior to the execution of the contract that was executed in 1906, we would like to make an objection to them on that ground.

(Testimony of Oscar P. Bondesson.)

Mr. MOLLOY.—My question refers to the year 1904.

Mr. MORTON.—Then the question is objected to upon the ground that oral testimony of any kind in this respect would be inadmissible for the reason that these negotiations, whatever they were, whatever they purported to be, were merged into a contract that was executed and entered into between the Secretary of the Interior and the Water Users' Association some two years subsequent to that time. Now that testimony is therefore incompetent. If this is the place, why, [164] we would be very glad to be heard.

The COURT.—Do you wish to ask any further questions of this witness as to any transactions or dealings had by the association with the Secretary of the Interior, or any of the officers of the Reclamation Service?

Mr. MOLLOY.—Yes, I would suggest that your Honor hear all of this witness' testimony, that the question raised by the counsel for the other side could be more intelligently disposed of by the court.

Thereupon the court ruled that under the rules of the court the question should be asked and the objections passed upon, and if sustained the testimony might be heard under Rule 46.

Mr. MOLLOY.—I will now also say that we are not offering this oral testimony solely for the purpose of curing an ambiguity in the contract. We are offering it for an entirely different purpose in

(Testimony of Oscar P. Bondesson.)

addition to that. That is only one of the reasons why it is offered.

The COURT.—What other purpose?

Mr. MOLLOY.—To show that a public notice was actually given under the provisions of Section 4 of the Reclamation Act.

The COURT.—How would the notice be material if the contract was not ambiguous and if the land owners were bound by the contract?

Mr. MOLLOY.—Well, it would be in one particular; that in no event could the land owners individually be bound by such a contract, and they are suing here in their own right, if the Court please. Now, if the Secretary of the Interior did make an estimate, as we contend he did, and determine the charges on May 10, 1904, and he gave a public notice of that, if a public notice was required, then no contract whatever that could be entered into by anyone could change the amount that would have to be paid, and as suggested to your Honor before, there is nothing in the contract showing what should be paid in specific figures, and we contend that there must [165] be written into the contract the law that the charges to be paid back is the estimated cost, and we have documents in evidence already, as we contend, showing that an estimate was made and that the cost was fixed at less than $40 per acre—as a matter of computation, at $30.28 per acre.

The COURT.—Pardon me, but I think we can reach this question more satisfactorily by consider-

(Testimony of Oscar P. Bondesson.)

ing the argument on the objection to the testimony. Now do you desire to ask this witness any questions before the court hears the argument on the objection.

Mr. KING.—If the Court please, not to waive any rights, I want to make this suggestion, without making a formal objection to this question, if the witness would be permitted to go ahead with his testimony and then raise the question on a motion to strike it out as incompetent, irrelevant and immaterial.

The COURT.—Very well, we will hear the witness' testimony then.

Mr. MOLLOY.—You may answer the question, Mr. Bondesson, if you please.

(The WITNESS.)—I assisted in the preparation of the petition to the Secretary of the Interior that was signed by numerous land owners in the Yuma Valley, asking what was expected by them in order to secure government irrigation of the valley, and assisted in the circulating of that petition and the preparation of the letter that went to the Secretary of the Interior by Mr. Winsor, the then president of the association; also secured a resolution by the Yuma County Board of Trade asking for the same things practically, and as I remember it, the town council of the Town of Yuma along the same lines, and in that we were under the directions of and cooperating with the engineers of the Reclamation Service, I think then called the Geological Survey, particularly Mr. J. B. Lippincott, and at times Mr.

(Testimony of Oscar P. Bondesson.)

Newell, the chief engineer. Mr. Lippincott was known as supervising engineer, I think, for the southwest district. [166] Anyway, it was Arizona, California and possibly one or two of the southwestern states. Mr. Newell was known as the chief engineer of the Reclamation Service, and those officers stated to me, among other things, that it would be necessary to form a water users' association so that the government could deal with it; and that it would be necessary to agree to dispose of all the surplus lands, in excess of 160 acres, in private ownership, and to secure to the United States all the charges and the cost of the project; and they required that as one of the preliminary steps; in fact, the first step, in accordance with the rules and regulations laid down by the Secretary of the Interior for the formation of the water users' association, and such steps were taken as will be seen by the articles of incorporation now on file in this case, and the organization was consummated in the early part of November, 1903.

In answer to our letter to the Secretary of the Interior requesting this data for government irrigation we received on the 28th day of May, 1904, a certain printed communication through the Wells Fargo Express Company, Yuma, Arizona. There were surveys being made during the time that we were organizing the plaintiff corporation over what is now the Yuma project.

The COURT.—* * * Now all of this testimony, each and every question asked, is being heard

(Testimony of Oscar P. Bondesson.)

subject to your (defendants') objection?

Mr. MORTON.—We so understand that.

The COURT.—So I think that it is not necessary that you object to each question unless you think that you will save time.

Mr. KING.—Only where the question calls for an answer, for example, which is not the best evidence, or something that would not come in a general objection as to the competency and relevancy.

(The Witness).—I have knowledge that A. F. Davis, [167] H. N. Savage, W. H. Sanders, B. M. Hall, George Y. Wisner and J. H. Quinton, met at Yuma, Arizona, on or about April 8, 1904, as a board of consulting engineers in connection with the Yuma project and its cost; and that A. P. Davis, who was then one of those consulting engineers, and known, I think, as assistant to Mr. Newell, is now the chief engineer and director of the Reclamation Service; and said board of consulting engineers requested me to meet with them on April 8, 1904, to discuss the cost and various other things in connection with the inaugurating of the project, and either at that meeting, or within a day or two following the copy of the letter now exhibited to me was handed to me, as secretary, for the files of the association, stating somewhat the conclusions of that meeting, and we were so informed by members of the board that that was a copy of their recommendations as sent to the chief engineer.

Mr. MOLLOY.—We offer the carbon copy in evidence as Plaintiffs' Exhibit 16.

Mr. KING.—We take it that it will go in subject to the general objection.

The COURT.—The ruling on that objection will be withheld for the present.

Thereupon Plaintiffs' Exhibit 16 was offered in evidence, and is in words and figures as follows to wit:

**Plaintiffs' Exhibit No. 16.**

DEPARTMENT OF THE INTERIOR, UNITED STATES GEOLOGICAL SURVEY RECLAMATION SERVICE.

Yuma, Arizona,
April 8, 1904.

Mr. F. H. Newell,
Chief Engineer, Reclamation Service,
Washington, D. C.

Sir:

We have examined the plans and estimates, and inspected the lands under the Yuma Project, as outlined in the report of J. B. Lippincott, herewith, exhibit 1. [168]

The project includes the construction of a diversion weir across the Colorado River, near Laguna, about 15 miles above Yuma, and the construction of a canal on each side of the river, for irrigation.

Much of the land is subject to overflow at high water, and it is consepuently necessary to build levees to prevent this. Drainage channels are also necessary, and at times of high water these must be discharged by means of pumping. All these plans

are contemplated in the estimates, which we have found to be essentially correct, but have modified in some details. We enclose a copy of our modified estimates herewith, exhibit 2.

We approve the general plan submitted, but have directed some further investigations in order to consider an alternative crossing of the Gila River.

The legality of the diversion of the Colorado River is essential to the feasibility of the project. The unregulated waters of the river are sufficient for all requirements of the Yuma Project as soon as their diversion is authorized.

The lands are in general very fertile, but on the California side are all included in the Indian Reservation, and we regard these as essential to the project, and legislation providing that these lands must bear their proportion of the cost of reclamation, is necessary to the feasibility of the project.

The lands on the Arizona side are mainly in private ownership, and the estimated cost of the project is so great that it is not feasible unless practically all of this land contributes to the cost. A small portion of this land is also in holdings greater than 160 acres, and all will be benefited by the levee and drainage improvements, whether it receives irrigation water or not. For these reasons we consider it imperative, not only that the owners of these lands execute liens on their land for the return of the cost of reclamation, but also that the owners of holdings exceeding 160 acres in all, shall guarantee to dispose of their surplus holdings in tracts of 160 acres, or less, in order to make full

compliance with the provisions of the [169] reclamation act. In order to secure this end we recommend that all such surplus holdings be transferred in trust to the Water Users' Association, to be sold in small tracts before the completion of the work, to persons qualified and binding themselves to take water for irrigation, under the contract between the Secretary of the Interior and the Water Users' Association.

It is also essential that legal guarantees be obtained that the costs of rights of way for canals, levees, power and pumping plants and the rectification of the channel of the Gila and Colorado Rivers, shall be reasonable.

When the conditions above outlined have been complied with, we recommend for construction the Yuma Project under the general plans prepared, subject to such modifications as have been or may be in future made by consulting boards.

To this end we recommend that Mr. J. B. Lippincott be instructed to proceed with the preparation of detailed plans and specifications for the project, and that the Honorable, the Secretary of the Interior be requested to give his general approval to the Yuma Project, and that the sum of $3,000,000 be set aside in the reclamation fund, for the con-

(Testimony of Oscar P. Bondesson.)

struction thereof, subject to the fulfillment of the above described requirements.

Very respectfully,

(Signed) A. P. DAVIS.
H. N. SAVAGE.
W. H. SANDERS.
B. M. HALL.
GEO. Y. WISNER.
J. H. QUINTON.

(Copy)

NOTE:

In regard to land exceeding 160 acres in one holding, or those owned by non-residents, the requirements of this report will be met by a deed of trust to the Yuma County Water Users' Association, with power to sell at public auction, upon the completion of the irrigation project—if not sooner sold by the owner—to persons eligible to complete a water right under the Reclamation Act. [170]

(The Witness Bondesson resuming.) There were present at that meeting the consulting engineers whose names appear in the last exhibit, No. 16, introduced in evidence, and also the board of governors of the Yuma County Water Users' Association, and a large number of its members, prospective members, farmers of the valley, possibly also some of the people about the town of Yuma; and it was stated by the board of consulting engineers to that body of people, including the board of governors of said association, that the cost of the Yuma project and its initiation and construction would be, as

(Testimony of Oscar P. Bondesson.)

we thought then rather high, about $35 per acre; that all of the lands outside of the 160 acres in private ownership would have to be deeded in trust to the association with a view of selling those lands later when the project would be completed to persons who could qualify to take a water right under the law, either 160 acres or less; and as to the $35 per acre it was regarded as being rather high at that time, and there was considerable doubt expressed as to whether or not the people would accept the terms; also with reference to the selling of the excess lands. There were larger holdings at that time in private ownership than 160 acres. And practically every one, both the consulting engineers and the board of governors of the association, and other people being present, that is, farmers, expressed doubts as to the land bearing the $35 per acre. We were not accustomed—we had not expected to have to pay that much for reclaiming the land; and finally the consulting engineers informed us that they had recommended the construction of the project notwithstanding the cost of $35 per acre.

The next step in the negotiations by the people and the plaintiff corporation toward getting the project started was the calling of a meeting of the farmers and land owners only to be held at a place called Tule Laguna, in the Yuma Valley, to discuss the possibility and practicability of signing up our lands to the government, as we called it, for reclamation. I mean [171] the land owners within what is designated in the articles of incorporation and

(Testimony of Oscar P. Bondesson.)

the contract as the Lower Colorado River Irrigation District, and there were present at this meeting at Tule Laguna practically all of those land owners. The meeting had been well advertised and it was a living issue at that time as to which way we should go. This meeting was on May 2, 1904. It was a debatable question as to which way we should go for the reason that we had then two or three so-called canal companies that had been supplying water to the valley, but not satisfactorily, and there was a new company coming into the field known as the Colorado Delta Canal Company, San Francisco capitalists, I believe, that were asking people to sign up with them, and pressing very hard for members at that time, and that company was offering water rights at $15 per acre, eight per cent interest basis, about twenty-five years, as I remember it, to repay the cost, and $3.00 per annum per acre for annual maintenance, which would entitle the holder to get three acre feet of water. At this time the Reclamation Service had not, in a public way, circulated any maps or plats showing the nature and extent of the construction that they proposed to erect for the benefit of the people. There was then no printed prospectus out on the part of the government, meaning the Reclamation Service, but the Colorado Delta Canal Company did have such a prospectus out at that time. The sketch map which you hand me I have seen before, and it is a map and letter, prospectus, or whatever you wish to call it, of the plan of the Colorado Delta Canal Company for diverting

(Testimony of Oscar P. Bondesson.)

water from the Colorado River at a distance above the government's plan, and irrigating not only the valley, but also what is known as the Mesa lands in the Yuma Valley. I am very familiar with the territory covered by both of these proposed projects. I mean the project proposed a little later by the government, and which is now the subject of this law suit, and the project proposed by the Colorado Delta Canal Company; and I am familiar with the Mesa lands referred to, and also with the bottom lands, and the [172] map of the Colorado Delta Canal Company you have just handed me covers substantially the same territory and lands covered by the map in Plaintiffs' Exhibit 15 for identification with the addition of the Mesa Lands that I have mentioned that are not shown on the Government's map.

Mr. MOLLOY.—For the purpose of illustrating the witness's testimony, we offer in evidence this prospectus—the face of it, not the back—of the Colorado Delta Canal Company, which is said by the witness to have been in existence on May 2, 1904, prior to the making of the estimate for the Yuma Project by the Secretary of the Interior, as shown by our Exhibit 4.

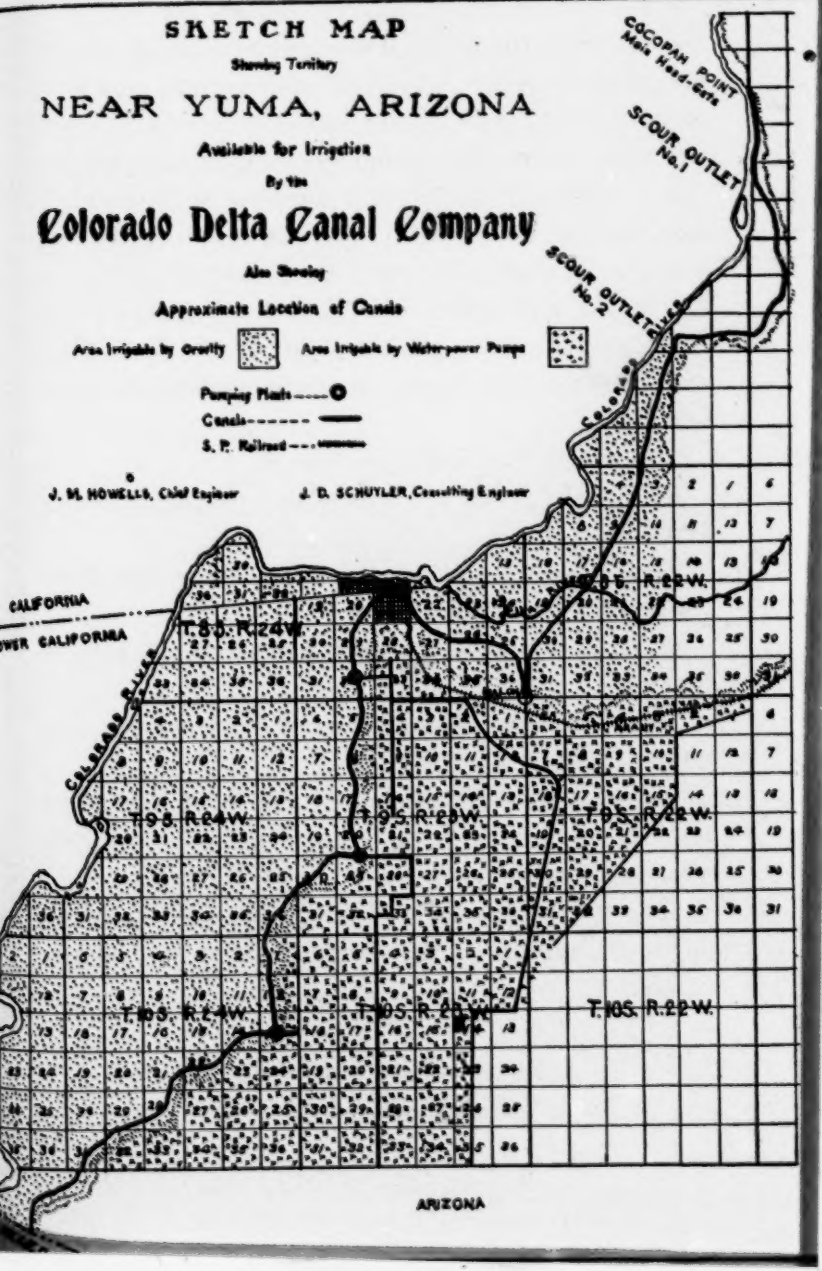
Mr. MORTON.—The same objection goes to all this.

Mr. MOLLOY.—I am offering it as plaintiffs' Exhibit 17, subject to the objection, of course.

The COURT.—The ruling on this objection will be reserved. Instead of being admitted it will just remain marked for identification.

Thereupon Plaintiffs' Exhibit 17 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 17.**



(Testimony of Oscar P. Bondesson.)

(The Witness resumes). The amount per acre that the Colorado Delta Canal Company proposed to construct this similar project to the one that was later constructed by the U. S. Reclamation Service was $15 per acre and $3 per annum for maintenance charge.

Mr. MOLLOY.—For the purpose of illustrating that portion of the witness' testimony, I have prepared a certified copy from the Recorder's Office in Yuma, State of Arizona, of one of their sample contracts showing the payment of $15 per acre extended over a great deal longer period than suggested by counsel.

The COURT.—You may offer it.

Mr. MOLLOY.—We will offer this as Plaintiffs' Exhibit 18.

The COURT.—It may be marked for identification, subject to the objection.

Mr. KING.—Are you insisting that that is competent?

Mr. MOLLOY.—Yes, in view of our whole case, we do.

The COURT.—Of course, if the court holds that there is no ambiguity in the contract, all this testimony will be excluded except under Rule 46.

Thereupon Plaintiffs' Exhibit 18 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 18.**

No. 11. 80 Water Rights.

WATER RIGHT CONTRACT.

THIS CONTRACT, made between the COLORADO DELTA CANAL COMPANY, a corporation, hereinafter termed the corporation, whose corporate existence for all purposes is hereby admitted, the party of the first part, and James W. Tucker of Yuma, County of Yuma, Territory of Arizona, the party of the second part,

WITNESSETH:

FIRST, That in consideration of the covenants and agreements herein contained and of the sum of fifteen ($15) dollars per acre, amounting to the total sum of Twelve Hundred ($1200), Gold Coin of the United States of the present weight and fineness, to be paid by the party of the second part in the manner and at the time hereinafter stated, the corporation agrees to deliver as herein provided to the party of the second part for the purpose of irrigating the land herein described, all the water which may be required, not exceeding at any one time one and one-half (1½) cubic feet per second, as measured at the main head gate of the canal, for every quarter section, or one hundred and sixty (160) acres of land, or in like proportion for a greater or less area of land, but in any event to include all of the following described land: The North one-half of the Northeast One-Fourth- (N. ½ NE. ¼) of Section

(Testimony of Oscar P. Bondesson.)

thirty (30) in Township 8, South, Range 23 West, G and S R B and M.

SECOND, The party of the second part shall pay to the authorized agent or banker of the corporation in Yuma, Arizona, in Gold Coin of the United States of the present weight and fineness, the sum of fifteen (15) dollars per acre, as follows:

The sum of five (5) dollars per acre on February 28, 1908, or $400; the sum of five (5) dollars per acre on August 31, 1910, or $400; the sum of five (5) dollars per acre on February 28, 1933, or $400.—$1200. (With provision for interest at 8% per annum.)

(There are sixteen more paragraphs, 3d to 18th, but they not being material on this appeal herein they are omitted.)

IN WITNESS WHEREOF, etc., May 27, 1903.

COLORADO DELTA CANAL COMPANY,

[Seal] H. W. POSTLEWAITE, Pres.

Attest:

G. L. Bennett, Secretary James W. Tucker.

(Duly acknowledged. Certified by County Recorder, Yuma County, Arizona, as being recorded in Book A1, Water Right Deeds, page 5.) [174]

(The Witness). In the discussion at the meeting of the land owners at Tule Laguna on May 2, 1904, it appeared to be the consensus of opinion that it would be better to get the government aid if it could be obtained, even at a higher price, and not go on with the Colorado Delta Canal Company. On the following day, as I remember, or very soon afterwards, there was a letter dispatched to the Secretary

(Testimony of Oscar P. Bondesson.)

of the Interior with all the things included that I have mentioned. I mean the letter that is incorporated in the pamphlet that is offered in evidence in this case as Plaintiffs' Exhibit 15, and I am now looking at that exhibit, and it is the letter. It was dated on May 3d. I think it was sent on the evening of that date, or possibly the day after. I mailed it myself, and it was signed by Mr. Winsor, President. It was actually sent, and this is a copy of it on the front page of this pamphlet that we have in this case at the present time as Plaintiffs' Exhibit 15, and it refers in the third sub-paragraph to the earnest desire and request of the association, by its board of governors, for the construction of irrigating works on the Lower Colorado River, which request was in a separate document signed by all the governors, as I remember it, the president and the board of governors, who consisted of W. H. DeBerry, Jake E. Hayden, B. F. Hopkins, J. M. Thacker, John Gandolfo and Mr. Winsor, as ex-officio president. The instrument which I hold in my hand is a copy of the letter that was drafted for the signatures of the board of governors accompanying the letter of transmittal of Mr. Winsor, the president, and appears to be signed by three persons I have mentioned as governors, and I account for the fact of the copy not being signed by the others because it was done more or less hurriedly in getting the communication off, or some of the governors being asked to sign twice perhaps only signed the original and did not sign the copy; and if the signatures of the other three or

(Testimony of Oscar P. Bondesson.)

four governors were appended to this copy it would be a true copy, as far as I know, of the document that was actually forwarded to the Secretary of [175] the Interior.

Mr. MOLLOY.—We will offer this in evidence as Plaintiffs' Exhibit 19.

Mr. MORTON.—This comes within the objections.

The COURT.—Yes. It will not be ruled upon at this time. Just marked for identification, subject to the objections.

Thereupon Plaintiffs' Exhibit 19 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 19.**

YUMA COUNTY WATER USERS' ASSOCIATION.

Yuma, Arizona.
May 3, 1904.

To the Honorable E. A. Hitchcock,
Secretary of the Interior,
Washington, D. C.

We the undersigned, constituting the Board of Governors of the Yuma County (Arizona) Water Users Association, in behalf of the Association and a large majority of the land owners in the valley of the Colorado River who are known by us to regard the building of irrigation works by the Government as of vital importance to their future welfare, most respectfully petition you to submit through this Board to the land owners living within the boun-

daries of the district proposed to be irrigated and reclaimed, complete plans of the irrigation works projected for the lower Colorado valley and their cost per acre to the land that can be irrigated both public and private, together with such information and instructions as will guide this Board in its dealing with individuals and corporations already owning land and using water from the Colorado River.

(Signed) M. WINSOR, President,
(Signed) J. M. THACKER, Vice-Pres.
(Signed) M. H. DE BERRY. [176]

(Witness). This communication I speak of was sent on May 3, 1904, as of its date; and the plaintiff corporation received an answer to this communication of May 3, 1904, on May 28, 1904, when there came to Yuma, Arizona, a number of Reclamation officials to further discuss this matter, and on that day I received, as I have stated, through Wells, Fargo Express Company, at Yuma, Arizona, this pamphlet for distribution. The carbon copy of a portion of the letter that is incorporated in Plaintiffs' Exhibit 15, which has just been handed me, was received, to the best of my recollection, after the printed copy had been forwarded to us by express, and it appears to be a copy from which the pamphlet was printed—that is, a printer's copy. So far as I know there was no other reply in the files of the plaintiff association to the letter of the president of May 3, 1904, other than the pamphlet itself and the carbon copy which was sent to me after the pamphlet was printed, so far as I know. This pamphlet is the reply. After May

3, 1904, and before the arrival of the pamphlet, I received the letter which I hold in my hand, which is a letter from Mr. J. B. Lippincott, Supervising Engineer, to me, and is dated on May 10, 1904, and was received by me as secretary of the Water Users' Association.

Mr. MOLLOY.—We will offer it in evidence.

Mr. MORTON.—This comes under the general head of our objections. It might be marked for identification, I suppose.

The COURT.—It may be marked for identification.

Thereupon Plaintiffs' Exhibit 20 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 20.**

DEPARTMENT OF THE INTERIOR.

UNITED STATES GEOLOGICAL SURVEY
HYDROGRAPHIC BRANCH.

Los Angeles, Cal.,
May 10, 1904.

Mr. O. P. Bondesson,
Yuma, Arizona.

Dear Sir: I sent you the following telegram this morning. [177]

"Secretary has allotted three millions for Yuma project conditional on satisfactory organization of irrigators and signing of contracts with them. Proposition now entirely dependent

on irrigators. Write progress of organization to me and state if arrangements have been made with Kibbey."

After having sent this it occurred to me that I had acted with questionable propriety in recommending Judge Kibbey to you. I have no occasion whatsoever to retract my recommendation, but it may be something of a presumption for me to have made any recommendation whatever along this line, and consequently I sent you another message as follows:

"Consider message sent today strictly confidential pending further communications."

I wish to renew my statement that it is absolutely necessary for you people to organize under the Reclamation Act in some way so as to satisfy the Secretary of the Interior, and that this should be done promptly, if at all, in order that we may follow up our investigations for the construction of the plant. Whom you employ as your legal counsel is a matter for you to decide, and not for me. I wish to congratulate you on the outcome of our efforts as far as they have gone for the Yuma Project.

If you can arrange for me to meet your counselor, whoever he may be, and some of the officers of your association, either Mr. Perkins or myself will try to come to Yuma for that purpose. I would be obliged if you could arrange these matters by wire so as to expidite things.

Very truly yours,

J. B. LIPPINCOTT, (Signed)

Supervising Engineer. [178]

(Testimony of Oscar P. Bondesson.)

(The WITNESS). The letter just offered in evidence as Plaintiffs' Exhibit 20 refers to a certain telegram reciting that it was sent to me on the morning of the date of the letter, which telegram I received. The original of the telegram is lost and cannot be found, after diligent search.

Q. That is, conveying the news that the Secretary of the Interior had set aside three millions of dollars for the construction of the Yuma project?

Mr. KING.—We object to that as not the best evidence. I think the telegram should speak for itself.

The COURT.—Yes, I think you may not repeat what the telegram contained unless a copy of it is set forth in that letter.

Mr. MOLLOY.—We have been unable to find the telegram itself, and that is what I meant to convey.

Mr. KING.—We object to that as not the best evidence.

The COURT.—First show that you have made diligent search and failed to find it.

Mr. MOLLOY.—Q. Have you searched for the original of that telegram?

A. Yes, I have lately.

Q. And you saw me search? A. Yes, sir.

Q. And the secretary? A. Yes, sir.

Q. What was the result of those searches?

A. We didn't seem to be able to find it.

Q. It wasn't found? A. No, sir.

Q. Then I will ask you if the purported telegram

(Testimony of Oscar P. Bondesson.)

set forth in Mr. Lippincott's communication of May 10th, 1904—

Mr. KING.—We will renew the objection.

Mr. MOLLOY.—Q. —is a true copy of the telegram that was sent to you on that date?

Mr. KING.—We object to it as not the best evidence.

The COURT.—As I understand it, they propose to show what the contents of the telegram, of this telegram was by showing that it has been lost or destroyed. I think a sufficient [179] foundation has been laid. Objection overruled.

Mr. MOLLOY.—Q. You may proceed.

The COURT.—Q. Do I understand that you searched through the records and papers of the company, and neither you nor the secretary nor your counsel could find such telegram?

A. Yes, sir.

Q. Well, do you know that such a telegram was received? A. Yes, sir; I do.

Q. You saw it and read it?

A. Yes, sir; I received it.

Mr. KING.—I would like to note an exception.

The COURT.—Yes.

(The WITNESS). On May 14, 1904, I received a letter from Mr. Lippincott.

Mr. MOLLOY.—We will offer this in evidence as Plaintiffs' Exhibit 21, particularly referring, as I understand it, to the printing of the pamphlet.

Mr. MORTON.—The same general objections.

The COURT.—It may be marked for identification.

Thereupon Plaintiffs' Exhibit 21 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 21.**

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY
HYDROGRAPHIC BRANCH.

Los Angeles,
May 14, 1904.

The Yuma County Water Users Assn.,
c/o O. P. Bondesson, Secy.,
Yuma, Arizona.

Gentlemen:

I am pleased to be able to officially inform you that the Secretary of the Interior has made an allotment from the Reclamation fund available for the construction of the Yuma Project. He has set aside $3,000,000.00 for this purpose. [180]

About a month ago I prepared for Mr. F. H. Newell a statement which I desired he should make to you in a general way descriptive of the works which we contemplate constructing. At that time he did not think it proper to issue this statement and advised waiting until the Secretary of the Interior had taken action in the matter. He now informs me by wire that I may issue this statement. I have it practically written and prepared to send to you, accompanied by maps and drawings. This

statement is to be issued in connection with the negotiating with various land owners to sign agreements with your Water Users Association.

I presume there will be a large demand for this and in order to have it promptly issued I suggest that it would be desirable that it should be printed in Los Angeles. We could have it done in Washington, but, it probably would be with months of delay in the Government printing office. I think there should be several maps and plates in this little circular and I suggest that *your Association* have this work done in Los Angeles.

I have a wire from Mr. Newell that he will be in Yuma about the 27th. I think that it would be very proper for us to have this date available at that time and that you should have your Board meet Mr. Newell then. I think it would be well for you to also be represented by attorneys.

I will get an estimate on the cost of having this printing done and furnish it to you by wire probably on Monday. If you care to have it done, please notify me as to how many copies you think you need. If the printing is done in Los Angeles I have no funds from which I will be authorized to pay for such work.

I wish to acknowledge receipt of various papers prepared for Secretary of the Interior and also your letter of May 10th for which please accept my thanks. I think the papers are prepared in very good form.

Very truly yours,

J. B. LIPPINCOTT, (Signed)

Supervising Engineer.

(Testimony of Oscar P. Bondesson.)

1,000 pamphlets will cost you $50.00. If you wish me to attend to it please wire me. J. B. L. [181]

Mr. MORTON.—We understand, if your Honor please, that those early documents are merely marked for identification the same way?

The COURT.—Well, I understand he is actually offering them, but I am reserving the ruling and allowing him to have them marked for identification.

The CLERK.—Some have been admitted according to my records.

The COURT.—Where no objections were made they were admitted.

(The WITNESS). I acceded to Mr. Lippincott's suggestion or request as set forth in the letter of May 14, 1904, about having the pamphlets printed in Los Angeles. I think that suggestion or request was both oral and in writing. I received from Mr. Lippincott the letter dated May 17th, 1904, which is handed me.

Mr. MOLLOY.—We offer this as Plaintiffs' Exhibit 22.

Mr. MORTON.—This comes within the general coterie of things objected to as introduced.

The COURT.—It may be marked for identification, and the ruling reserved.

Thereupon Plaintiffs' Exhibit 22 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 22.**

"DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY
HYDROGRAPHIC BRANCH.

Los Angeles, Cal.,
May 17, 1904.

Mr. O. P. Bondesson,
Yuma County Water Users' Association,
Yuma, Arizona.

Dear Sir: I wish to acknowledge receipt of your letter of May 13th. I wired you today as follows:—

"Newell and I will meet your people Yuma on the twenty-seventh. Desirable your attorneys have plan outlined for them then. I have engagement Frisco the twenty-third, can send data to Yuma but I can't be there then. Can't your representative come here on the twentieth."

[182]

I would like very much to come to Yuma on the 20th, but I have an engagement in Los Angeles on the 19th and one in San Francisco on the 23d. If I included the one in Yuma on the 20th I am afraid they would come too thick for me and that I would get tangled up with it.

I think it desirable that Judge Kibbey should go through your Articles of Incorporation and have a definite program and Articles to submit to Mr. Newell and his attorney, Mr. Morris Bien who will be with him. I think it will greatly expedite matters if this is done. If you could come here on the 20th with Judge Kibbey we could have all the data

(Testimony of Oscar P. Bondesson.)

together in my office here and work on it in the evening of the 20th, the 21st and 22d, and Mr. Perkins and Mr. Hamlin will both be here after I start to San Francisco. I am very anxious to have matters arranged so that we can begin construction as soon as cool weather begins in the fall. If it is absolutely necessary I can send an engineer to Yuma for the 20th, but I do not think this would be as satisfactory as for you to come up here.

Very truly yours,
J. B. LIPPINCOTT, (Signed)
Supervising Engineer.

I have your wire saying that you cannot come up here on the 20th. I will therefore send Mr. Homer Hamlin to Yuma for the 20th to meet your attorneys.

J. B. L. [183]

(The WITNESS.) The last letter dated May 17, 1904, Plaintiff's Exhibit 22, refers to a certain other telegram sent by Mr. Lippincott to me, which I undoubtedly received. The announcement that the supervising engineer and the chief engineer of the Geological Survey were to meet the officials of the Water Users' Association in Yuma, Arizona, on May 27, 1904, was communicated to me by the letters in evidence as Plaintiff's Exhibits 21 and 22, and not from the pamphlet or purported carbon copy of that letter I hold in my hand. This carbon with the printer's marks on it on the back as to one M. copies, meaning one thousand copies, I received subsequent to receiving the pamphlet. It

(Testimony of Oscar P. Bondesson.)

came from the Los Angeles office of the supervising engineer, Mr. Lippincott. It contains two carbon copies, and it has annexed to it a carbon copy of Mr. Winsor's letter of May 3d, which were all sent to me at the same time.

Mr. MOLLOY.—We offer both documents together as one exhibit.

Mr. MORTON.—Do I understand, Mr. Molloy, that you offer this as the copy from which this (the pamphlet Plaintiff's Exhibit 15), was taken, the printer's copy?

Mr. MOLLOY.—This coming from the supervising engineer, it seems the only purpose it could serve, and it seems, as far as Mr. Bondesson's memory goes, and as our researches have led us to believe, there never was an original of the printed letter sent or delivered to the Yuma County Water Users' Association.

Mr. MORTON.—Is it in the testimony of this witness that this came from Mr. Lippincott?

Mr. MOLLOY.—Yes.

Mr. MORTON.—Would you mind asking him how he knows that?

(The WITNESS.) I have knowledge that those copies came from Mr. Lippincott because I was secretary of the association at the time, and it was either sent to me or delivered to me in person for our files by Mr. Lippincott, and Mr. Lippincott [184] came on the 27th, as announced in the letters that are in evidence. The meeting was on the following day.

(Testimony of Oscar P. Bondesson.)

Mr. MOLLOY.—We offer it for what it is worth.

Mr. MORTON.—Let the usual objection be made, and it also occurs to us that the matter has not been sufficiently identified, the foundation for its introduction hasn't been laid, as to what it is. The witness has expressed a guess. It has no signatures. The witness suggests no letter of transmittal accompanying it.

The COURT.—It may be marked for identification just as the other documents.

(Papers marked by the Clerk Plaintiffs' Exhibit 23 and 24 for Identification, respectively.)

(Those exhibits being incorporated in Plaintiffs' Exhibit 15 as the letter of May 3, 1904, purporting to be signed by M. Winsor, President, and the communication of the Chief Engineer under date of May 10, 1904, including the letter of the Secretary of the Interior, but without the signature of the Chief Engineer, or the maps made part of Plaintiffs' Exhibit 15, the same are not set forth here.)

(The WITNESS.) Mr. Lippincott, the supervising engineer, and Mr. Newell, did came to Yuma, Arizona, on May 27, 1904, to have a conference with the officials of the Yuma County Water Users' Association, as promised in those letters, as well as Mr. Morris Bien, legal advisor of those officials, Mr. B. M. Hall, consulting engineer, also Mr. Hamlin, as consulting engineer, who later became project engineer. Mr. Bien is still connected with the U. S. Reclamation Service.

Mr. KING.—We will admit that he is.

(Testimony of Oscar P. Bondesson.)

WITNESS.—Mr. B. M. Hall is the same person who is mentioned in the report of the board of consulting engineers. When those gentlemen arrived in Yuma the pamphlet that is offered in evidence as Plaintiffs' Exhibit 15 had not yet arrived. Those officials met the officials of the plaintiff [185] corporation on May 28, 1904, in the office of the Water Users' Association. Those officials stated that they were surprised that the pamphlet had not arrived, inasmuch as it had been sent about the time when the engineers left Los Angeles. That statement was made by Mr. Lippincott, who said that the pamphlet should arrive by Wells-Fargo most any time, and following his suggestion I got it at Wells-Fargo, as I stated before. The meeting with our officials was held quite early in the forenoon of May 28th. It was a meeting of the board of governors of the Yuma County Water Users' Association, and there were present all of the board, I think, with the exception of one. There were other land owners, and the officials of the Reclamation Service that I have named. I kept the minutes of the meeting.

Mr. MOLLOY.—You may read the minutes.

The WITNESS.—I have here on page 16 of the minutes of the board of governors under date of Yuma, Arizona, May 28th, 1904, "A special meeting called by the president for the purpose of meeting Mr. Newell and other representatives of the Reclamation Service. Present, M. Winsor, President; W. H. De Berry, J. E. Hayden, J. M. Thacker,

(Testimony of Oscar P. Bondesson.)

B. F. Hopkins, C. E. Yarwood, members of the board; Joseph H. Kibby and F. L. Ingraham, attorneys for the association, and O. P. Bondesson, secretary. On behalf of the Reclamation Service, F. H. Newell, Chief Engineer, J. B. Lippincott, Supervising Engineer, B. M. Hall, consulting engineer, Homer Hamlin, consulting engineer, Morris Bien, attorney for the Reclamation Service. Mr. Lippincott addressed the board on behalf of the Reclamation Service, stating position from an engineering standpoint; gives notice of allotment of three million dollars by the Secretary of the Interior for the Yuma project and states that it is now up to the people in the proposed district to sign contracts satisfactory to attorneys on both sides. Mr. Newell addressed the board also, stating position of the department, says it is a business proposition in the interest of home building for families, money must be secured and returned, [186] every man standing on an equality, no monopoly, forty acres or a small unit of the entire area should be occupied by a family in the course of events. Mr. Bien addressed the board, stating that he has spent the morning in looking over articles of incorporation; thinks that generally they are all right, have followed closely the articles applying for Salt River Valley; will endeavor with the help of Judge Kibby and Mr. Ingraham to have papers ready by to-morrow evening. Mr. Hall addresses the board stating that he is a member of the board

(Testimony of Oscar P. Bondesson.)

of consulting engineers, is highly pleased with the spirit of the people in taking hold of the proposition. After a general discussion by members of the board and those representing the Reclamation Service, board adjourned until the following day. M. Winsor, president, O. P. Bondesson, Secretary."

At the time of that meeting, the pamphlet, Plaintiffs' Exhibit 15, had not yet been secured from the express office. I secured it about noon of that day. The purpose of getting the pamphlet at that time was to distribute it to the land owners generally who were practically all in town on that day, and I was requested and directed by Mr. Newell or Mr. Lippincott to distribute it to the land owners.

The COURT.—Does that represent contracts which had been or which were to be drawn?

Q. I mean the minutes there. What was it you said about the contracts?

A. Merely—let's see—that the contracts, that is to say, the land owners were—

*A.* Let me see the minutes there. That is what I mean.

(The minutes read by the Court.)

The WITNESS.—In response to that request, I distributed the pamphlets to the land owners within the Lower Colorado River Irrigation District. That is within the proposed project. [187] The land owners were in the town of Yuma for the reason that there had been a mass meeting called for that evening, and it had been advertised extensively over the entire proposed project. The mass

(Testimony of Oscar P. Bondesson.)

meeting had been called because it was very important. We were about to decide whether or not we wanted Government irrigation and on what terms we could get it.

Mr. MOLLOY.—What communications, if any, from the chief engineer and supervising engineer was this meeting based upon? Did the letters that had been sent you and the association informing you that those officers of the Government would meet the officials of your company have anything to do with the calling of this meeting?

The WITNESS.—The officers of the association had knowledge that the Reclamation engineers and their attorney were coming down for that purpose, to arrange to get the people to sign up the lands. We had advertised in the papers the fact that they were coming, and distributed handbills to that effect, with the result that practically every land owner in the entire district was in town on that day, and it was to those land owners that I distributed numbers of those pamphlets, in which I was assisted by my partner in the abstract business, Mr. Marvin, and practically every officer of the association. I was then an old settler in the Yuma Valley, where this project was under consideration, and I personally knew all of the land owners, and I handed this pamphlet (Plaintiffs' Exhibit 15) to the land owners. The mass meeting was held in what is known as Elks' Hall, in the Gandolfo Hotel Building, Main Street, Yuma, Arizona, at about eight o'clock in the evening, and the pamphlet was

(Testimony of Oscar P. Bondesson.)

distributed or handed to those people who came to the meeting late, and who had not received a copy of it during the day. The land owners might have read the pamphlet, and I saw some of them reading it. The land owners were practically all there at the meeting, as many as could get into the hall—the Elks' Hall. It was the largest hall in town at that time, about twice the size of this courtroom. [188] All public meetings of that character were then held in that hall. Mr. Winsor, the president of the association, presided at the mass meeting, at which there was speaking, and Mr. Newell, Mr. Lippincott, Joseph H. Kibby, addressed the meeting, and I think Mr. B. M. Hall, a consulting engineer, made just a few remarks. I mean by Mr. Lippincott and Mr. Newell, supervising and chief engineer, respectively, of the Reclamation Service. The Kibby that I spoke of was known as Judge Kibby of Phoenix, Arizona, since, or at, that time Governor of Arizona. He was the Water Users' associate counsel at that time. Mr. Smythe also made quite a lengthy address, but he was not connected with the Reclamation Service at that time. He was an attorney at law, of San Diego, and was known as the "Father of the Irrigation Congress."

Mr. Newell and Mr. Lippincott made practically the same representations to the mass meeting that had been made to the Board of Governors, with more or less elaboration. That is, it required a longer time to say it, and my recollection is that Mr. Newell represented the Secretary of the In-

(Testimony of Oscar P. Bondesson.)

terior at that meeting, and that he purported to speak for the Secretary of the Interior. The pamphlet was on the stand at the meeting. The substance of what Mr. Newell said was, as I remember, that he stated that the length of time required to finish the project would be about two years from the time the contracts were let, and that they were practically ready to let the contracts when the land owners would sign the subscription agreements; and that the estimates were ample, and that the cost of the project would underrun rather than overrun the estimated figure, that being the estimate in the purported letter of the Secretary of the Interior incorporated in the pamphlet, Plaintiffs' Exhibit 15, and he said that the cost would underrun $35, and that it would be materially less than $35 in his opinion, and that that figure allowed for everything. His speech was rather elaborate, quite complete, I would say. [189]

Mr. Lippincott said that the project could be built for that amount of money; and, as I remember it, he stated that they were very anxious to get started on letting contracts for the dam; the building of the dam would require the longest period of time; that was the key to the entire situation, and that simultaneously, while the dam was being constructed that other work would progress so that when the dam was finished the water would flow to the lands, and as I remember it, he staked his reputation on the fact that the dam could be built successfully, to stick, and that the project would in

(Testimony of Oscar P. Bondesson.)

every way be a very desirable project, and that it could be constructed for the amount in the estimates or less. Both Mr. Newell and Mr. Lippincott, as I remember it, staked their reputation,—I know that Mr. Lippincott did. The drift of the whole matter was that the Government had done its part. That is to say, that the Reclamation officials had brought the thing as far as they could. The appropriation was made, and it was really up to the land owners as to whether or not they wanted that project, and whether they wanted it now. The difficulty would be if it was delayed that the money might be set aside for some other purpose, and it would be hard to get any. We were urged to get busy with the contracts, that is, the subscription contracts, which we did, and we were urged by everyone, including the officials of the Government, to get busy with the subscription contracts. I mean the sample form of subscription contract as in evidence here, Plaintiffs' Exhibit 14; this is the contract that the land owner was required to sign as a member of the association. We had those contracts already in print that we expected to use for that purpose, and, as I remember it, Mr. Bien suggested that in addition to what we already had there, there should be a line or something inserted about requiring each land owner to personally sign the articles of incorporation in addition to the subscription contract, and I think that was the only change that he suggested, and he didn't strenuously insist on that.

(Testimony of Oscar P. Bondesson.)

For a considerable period of time [190] Mr. Bien's suggestion was carried out. A great many people signed it, and when they signed the subscription contract we also placed before them a copy of the articles of incorporation which was pasted in a book similar to this minute-book, and they signed the record there. Mr. Lippincott spoke last, and after he got through, I remember distinctly making an announcement myself, with the permission of the chairman, that in the anteroom to the main hall were abstract records of every piece of land in the Yuma Valley, and that there were notaries public there ready to receive subscription contracts, and urged everyone present who wanted to, to sign it, immediately to sign it, and on that very evening, as many as we could take; that we were ready to work throughout the entire night if necessary. I remember that we had our entire force, the company that I represented, and there were other notaries. Mr. Molloy himself was there as Clerk of the District Court, ready to take acknowledgments; and we signed a great many land owners that night before closing the meeting, or rather after adjournment, but before dispersing. As I remember, there were approximately ten thousand acres of private lands signed that night. We followed that up the next day and the following day and continuously until we got about ninety-eight per cent of the private lands signed, which was accomplished, in my recollection, sometime in August, 1904. Subsequent to that meeting the pamphlet, Plaintiffs' Exhibit 15,

(Testimony of Oscar P. Bondesson.)

was used by us for the purpose of convincing anyone who came to sign if he hadn't read it carefully or didn't understand any part of it we used it as a basis of negotiation, and also if anyone wrote, that is, a nonresident would write concerning the project, we would mail him this pamphlet. Later it was used, that is, reprints of it were used by the real estate people as a matter of advertisement to prospective purchasers of land in the valley. There were a number of people who were slow about coming in to sign, and it was necessary to go and find them. That is to say, we had to send committees to find them where they lived, at [191] their homes, and those committees invariably carried several copies with them to be used and to be left for purposes of study, so that they might know how intelligently to proceed about signing up.

The letter that is now handed me is a letter from Mr. Lippincott, Supervising Engineer, of the Geological Survey, dated May 19, 1904, was directed to Mr. Winsor, president of the association. I recollect the letter being received, and made part of the files of the association.

Mr. MOLLOY.—We offer it as Plaintiffs' Exhibit 25.

Mr. MORTON.—The same objection.

The COURT.—It may be marked for identification.

Thereupon Plaintiffs' Exhibit 25 was offered in evidence, and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 25.**

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY

Hydrographic Branch.

Los Angeles, Cal., May 19, 1904.

Mr. M. Winsor, President,
Yuma County Water Users' Assn. Yuma.

My Dear Sir:

I have your letter of May 15th, and have noted contents. Mr. Newell advises me that he will arrive in Yuma on the 27th, and I am arranging for him to spend two or three days there. He will be accompanied by a Mr. William O. Pollock, from the office of the Assistant Attorney General of the Interior Department, and Mr. Morris Bien, who is an Attorney in our Department. I expect also to be there.

Mr. Homer Hamlin went to Yuma to-day. He is our accredited representative, and I trust that you will confer with him freely.

Yours very truly,
(Signed) J. B. LIPPINCOTT,
Supervising Engineer. [192]

The WITNESS.—On the morning of May 28, 1904, in addition to the pamphlet Mr. Lippincott furnished the association with a map, a larger map than that one included in the pamphlet. That map he carried with him in his personal baggage, and it was delivered to us on the morning of the board of

(Testimony of Oscar P. Bondesson.)

governors' meeting. We saw that really before we saw the pamphlet. The map is the first thing we knew of it. The map that is now handed me, which purports to be a United States Reclamation Service Map of the Lower Colorado River, showing the location of irrigable lands, proposed dams, canals, levees and pumping plants, dated in 1904, is the map that I mentioned as having been received by myself as secretary of the association for the use of the office of the secretary, and it was explained by Mr. Lippincott and Mr. Newell that it was made to represent the complete plan of the project as nearly as it could be presented on the map. It is an enlargement of the map which is printed in the pamphlet.

Mr. MOLLOY.—We will offer the map as Plaintiffs' Exhibit 26.

Mr. MORTON.—The objection to this will come under that general head.

The COURT.—Yes.

Plaintiffs' Exhibit 26 having been, by the order of Court, directed to be transmitted to the Circuit Court of Appeals for inspection by that court, it is not set forth here.

The WITNESS.—This map was afterwards used to explain the details as nearly as a map could explain them to prospective members of the association or to anyone who had business with the office, and I used this map in that connection. At that time I owned 160 acres of land within the Lower

(Testimony of Oscar P. Bondesson.)

Colorado Irrigation District; that is, the southwest quarter of Section 27, township 9, south, range 24 west, G. & S. R. Meridian, containing 160 acres, and I also owned the northwest quarter of Section 28, township 10, south range 24 west in the G. & S. R. Meridian. [193]

It was admitted by the defendants that the witness is the O. P. Bondesson whose name appears as an entryman on the tracts of land just described as delineated on Plaintiffs' Exhibit 5.

The WITNESS.—I signed up my land on May 28, 1904; that is, as to the one piece of land that I signed for water rights. The other piece of land had to be signed on a different kind of a contract and that contract was not then ready, the details had not been worked out. It was deeded in trust later to the Water Users' Association to be disposed of under certain terms, that is, under regulations made by the Secretary of the Interior.

The instrument which I hold in my hand is the instrument which I executed and the formality through which I went when I signed up my land, the southwest quarter of Section 27, township 9 south, range 24 west, and it is the filling out of the same blank that has already been offered in evidence as Plaintiffs' Exhibit 14. It has in it the line that was suggested by Mr. Morris Bien that was printed in afterwards. It was run through the press the second time for the purpose of putting in that line.

Mr. KING.—We move to strike it out as not the best evidence.

Mr. MOLLOY.—He is trying to explain the instrument. It appears that there is a line that is inserted in different printing, and he is trying to explain that that is the addition and correction requested by Mr. Morris Bien, which was acceded to by Judge Kibby and the association.

The COURT.—The question is whether you want it in.

Mr. MORTON.—What we meant, if your Honor please, was this: that if he was going to testify, we wanted the original rather than his verbal testimony.

The COURT.—Then you object to the testimony with reference to it on the ground that the writing was the best evidence?

Mr. MORTON.—Yes. [194]

The COURT.—Now you object to the writing.

Mr. MORTON.—We have this objection. I don't know whether it can be clearly segregated. We would have no objection to the introduction of this testimony if it is merely for the purpose of showing that he did subscribe his lands and is now under the project if it is within the lower valley lands, but we do object to it for all it has to do with a showing, the same showing that is attempted to be made here with reference to the pamphlet as a public notice. I think it would be wiser to have it go in just coupled under our general objection.

Thereupon Plaintiffs' Exhibit 27 was offered in evidence and is in words and figures as follows, to wit:

**Plaintiffs' Exhibit No. 27.**

AGREEMENT.

KNOW ALL MEN BY THESE PRESENTS: That I, Oscar P. Bondeson, do hereby subscribe for and agree to take 160 shares of the Capital Stock of the Yuma County Water Users' Association, corporation organized under the Laws of the Territory of Arizona, and for that purpose, and in order to become a member of said Association, do hereby, subject to all the provisions thereof and of the by-laws of said Association, not inconsistent therewith, subscribe to the Articles of Incorporation of said Association, as they appear in full in Book 1 of Articles of Incorporation, page 325, et seq., records of the Recorder's Office, Yuma County, Arizona, and the said record is hereby referred to and made a part hereof, and my signature hereto shall have the same force and effect as though the said Articles were in fact a part thereof, and were printed in full as a part hereof above my signature. And I hereby agree to subscribe to said Articles, or to a copy thereof upon request of said Association.

The said shares of stock and all rights and interests represented thereby, or existing or accruing by reason thereof, or incident thereto, are to be inseparably appurtenant to the following described

(Testimony of Oscar P. Bondesson.)

real estate: SW. ¼ of Sec. 27, Twp. 9 S., R. 24 W., G. & S. R. Mer., in Yuma County, Arizona, containing 160 acres and no more, of which I am the owner (or occupant having initiated right to acquire the same.)

Alice Y., wife, joins in, and agrees to be bound hereby.

Dated: May 28, 1904.

OSCAR P. BONDESSON.
ALICE Y. BONDESSON.

(Duly acknowledged.)

(Recorded May 31, 1904, in Book 5 of Bonds and Agreements, page 17, Records of Yuma County, Arizona.) [195]

The WITNESS.—I was desirous of getting Government irrigation for my lands, and I fully relied upon the statements that were made during that day and contained in that pamphlet as to the cost and the time when I would eventually get water; and if I thought, or if I could have foreseen, that the project would cost more than $35, or possibly $40, I would not have signed and delivered that instrument.

Mr. KING.—We object to it as argumentative and suggestive.

The COURT.—He may answer under the same conditions.

Mr. KING.—We save an exception.

The WITNESS.—No, sir; I would not have signed my land at that time.

Mr. KING.—I'd like to ask the counsel one ques-

(Testimony of Oscar P. Bondesson.)

tion: Do you recognize the Reclamation act as part of the contract?

Mr. MOLLOY.—Absolutely. We consider that the law is a part of every and all contracts.

The WITNESS.—As I have said, some time in August, 1904, ninety-eight per cent of the private land owners had signed up, but I meant to say that ninety-eight per cent of the entire project that was covered or would be covered by the canal was then —that is, that was signed—part of it was public land and most of it private land, and there was about ninety-eight per cent all told that was then subject to the water charge or would be subject to the water charge. From May 28, 1904, after the land owners began to sign up, the ownership of the private lands was constantly changing; that is, people sold a portion or all of their holdings. I ceased to be secretary and became president in 1907 —was elected in the fall of 1906. There was a period of a couple of years there that I was not an officer of the association. I was familiar, however, with the association at that time.

Mr. MOLLOY.—Well, after you became president and during the time that you say you were familiar with it, what inquiries, if any, did newcomers, that is, new purchasers and prospective purchasers make?

Mr. KING.—We object to that.

The COURT.—On what dates, at what time? [196]

Mr. MOLLOY.—It would be from August, 1904,

(Testimony of Oscar P. Bondesson.)

up until Mr. Bondeson ceased to be president; in the spring of 1909, about the first Monday in April.

Mr. KING.—We object. We hardly know what grounds to state it on because it is such an unusual question to ask a witness to state what somebody else thought and what they said and what they did. It is probably immaterial and will probably come in under the general objection that we expect to raise.

Mr. MOLLOY.—What I expect to prove as a result of the question is that as the new purchasers came and did purchase land they naturally knew and were bound to know that the land was subject to the lien given indirectly to the Government of the United States for the cost of this project. It not being stated anywhere in figures they naturally must have in the course of human nature and human events have inquired somewhere of somebody what the cost was to be, and I wanted to ascertain from this witness what, if he knew what happened and what steps were taken to apprise those people, or what steps they took to apprise themselves as to the probable cost of the project, what it would be, before they purchased from the then owners.

The COURT.—Well, I will let you do so.

Mr. KING.—If your Honor please, I would like to object, for the want of a better statement, as calling for the conclusion of the witness on psychological events and conclusions of law.

The COURT.—Well, I was going to suggest, in

(Testimony of Oscar P. Bondesson.)

order to make the record I would allow them to ask the question under Rule 46, but he must refer to designated persons and not to people generally. You will have to identify those who made the inquiry, and if some of them made inquiry and are permitted to rely upon that, it could not inure to the benefit of those who did not make the inquiry. So in propounding your question you must bear in mind you will have to prove which of the plaintiffs made that inquiry and were given the information that you spoke of. [197]

Mr. MORTON.—This will come under the general head, and I do not believe that it can be answered without being in this case merely hearsay, it being too remote to have any influence at all.

The COURT.—Well, if he remembers to whom he made them, gave the information, he may state under Rule 46.

Mr. KING.—I would like to add to my objection there the words "and hearsay."

Mr. MOLLOY.—Under his Honor's limitations you can answer the question.

The WITNESS.—I could probably give some names that I happen to think of; if I had time to refresh my memory I might perhaps give a great many names.

Mr. KING.—Pardon me, but did I understand your Honor to hold that this witness could testify to particular persons?

The COURT.—Subject to your objection, of course, and under Rule 46.

(Testimony of Oscar P. Bondesson.)

Mr. KING.—Well, I just wanted to avoid any misunderstanding. I save an exception.

The WITNESS.—I would say that there were a number of people from one particular place, Salinas, California, who I remember, that came and purchased land during that period, and came to the office for information concerning the cost of the project. One of them, Mr. H. A. Abbott, and Mr. John A. Donovan, who is a party plaintiff in this case, Ed Ingram, Joseph Ingram, Frank Vierra, two brothers by the name of Kellogg, Roland Vierra, Manuel Silva and V. H. Lent. They came for information for the purpose of purchasing land. Practically all those gentlemen, except Roland Vierra, are now the owners of land within this project and their lands are involved in this law suit. I also think both of the Kelloggs have sold. When those parties who inquired from me as to the cost of the project I showed them the map that we had in the office and the pamphlet that contained the information on the subject. I mean the [198] pamphlet was distributed at the meeting of May 28, 1904, and as offered in evidence in this case as Plaintiffs' Exhibit 15. Information was also conveyed to other prospective purchasers who afterwards purchased and before they purchased I might say it was the custom of the real estate men of the town to bring their customers to the Water Users' Association about the first step they did, afterwards they passed into the headquarters of the Reclamation Service to verify the statements that

(Testimony of Oscar P. Bondesson.)

we made or to generally get acquainted. Then they would start down looking for land, and sometimes they would purchase, and in all of those cases the pamphlet I have spoken of and the map were used as in the other cases that I have described.

The COURT.—What proportion of the land owners under the project were original settlers or owners?

The WITNESS.—At this time?

The COURT.—Yes.

The WITNESS.—I could not answer excepting in general—that is, an estimate. I would say that there were very few comparatively, probably ten per cent of the entire shareholders of the Yuma County Water Users' Association are so-called old timers who were there in the beginning. By going over the plats of the original settlers and owners as of May 10, 1904, as shown by the plats introduced in evidence as Plaintiffs' Exhibits 9 to 13, inclusive, I am sure I could pick them all out.

Mr. MOLLOY.—With the consent of counsel I would like to withdraw those maps temporarily for the purpose of having Mr. Bondesson go over them so that he may testify further on this matter tomorrow.

Mr. KING.—No objection.

The Court adjourned until tomorrow morning.

Tuesday, April 29, 1919.

Mr. BONDESSON recalled and direct examination resumed under examination by Mr. Molloy. [199]

(Testimony of Oscar P. Bondesson.)

Mr. MOLLOY.—Mr. Bondesson, after consulting the plats which are in evidence in this case, are you able to revise your estimate as to the number of acres within that portion of the Yuma project that is in controversy in this suit as held by what you call old-timers, that is, the original owners at the time, say, May 28, 1904?

Mr. KING.—I object to that as calling for a conclusion of the witness and as to a matter which the witness has not qualified himself to testify. It is leading and suggestive.

The COURT.—Objection overruled.

Mr. KING.—I take an exception.

The WITNESS.—I would say that I have looked over the plats and I have not made a list of the names nor the acreage, but made a somewhat hasty examination, and it might increase the estimate a little, not very much, and I think that possibly about fifteen per cent would cover the acreage.

The COURT.—I assume you state that of your own knowledge.

The WITNESS.—Yes, sir.

I am able at this time to recall the names of other specific individuals who afterwards purchased land within the Yuma project to whom I displayed the pamphlet that is offered in evidence here as Plaintiffs' Exhibit 15, namely, Arthur Hebbron, of Salinas, California, Daniel Culbert, from Warren, Arizona, and O. P. Culbertson, from somewhere in New Mexico.

From May 28, 1904, until ninety-eight per cent

(Testimony of Oscar P. Bondesson.)

of the private land owners were signed up, as secretary of the association, I was in constant communication with Mr. Lippincott's Los Angeles office relative to the obtaining of signatures to the contracts that are in evidence as Plaintiffs' Exhibit 14, and I am in possession of letters that I received from Mr. Lippincott in that connection, and for a time I tried to get a report to his office in Los Angeles daily about the progress of the work of signing up, for the purpose of showing that we were doing our [200] best to sign up the lands. These are all of the letters in that connection that I have.

Mr. MOLLOY.—We propose to offer these, as various exhibits in that connection.

Mr. MORTON.—Subject to the general objection.

The COURT.—They may be marked for identification.

Thereupon the following four letters, in words and figures as follows, were offered in evidence by the plaintiff, and marked for identification:

**Plaintiffs' Exhibit No. 28.**

DEPARTMENT OF THE INTERIOR.
United States Geological Survey.
Los Angeles, Cal., June 13, 1904.

Mr. M. Winsor, President,
Yuma County Water Users' Association,
Yuma, Arizona.

My dear Sir:

I wish to acknowledge receipt of a letter from

(Testimony of Oscar P. Bondesson.)

Mr. Bondesson, Secretary, stating that 32,000 acres of land have been signed up.

I would be very glad to have from you a statement as to just what lands have been signed up, the lands that are filed upon prior to the withdrawal under the Reclamation Act, about July 2, 1902, the lands that have been filed upon subsequent to that date, and the remaining public lands within the district, all these lands to be in Arizona between our canal lines and the levees. We will prepare a map for our office on which we can keep track of the progress of this work of signing up contracts, with a view possible of serving the lands that have signed up, and possible of eliminating areas that have not shown disposition to enter into our contracts, entirely from the proposition. We, however, are exceedingly anxious to get all lands signed up.

Very truly yours,
J. B. LIPPINCOTT, (Signed)
Supervising Engineer.

**Plaintiffs' Exhibit No. 29.**

DEPARTMENT OF THE INTERIOR.
UNITED STATES GEOLOGICAL SURVEY.
Reclamation Service.
Los Angeles, Cal., July 30, 1904.

Mr. M. Winsor,
Yuma, Arizona.

Dear Sir:

Enclosed please find a list of unsigned lands

under the Yuma Project. I thought it might be a matter of interest to you to have such a list. There is the opportunity of inserting the name and any remarks or reasons why these lands are not signed. We will endeavor to send you a large map in a few days bearing on this subject.

(enc.) Very truly yours,

J. B. LIPPINCOTT, (Signed)

Supervising Engineer. [201]

**Plaintiffs' Exhibit No. 30.**

DEPARTMENT OF THE INTERIOR.
UNITED STATES GEOLOGICAL SURVEY.
RECLAMATION SERVICE.

Los Angeles, Calif., August 17, 1904.

Mr. M. Winsor,
President Yuma Co. Water Users Ass'n.,
Yuma, Arizona.

Sir:

I wish you would please send me copies of the forms of water contracts used by the various companies in the Yuma Valley. I wish to know particularly whether the persons who have signed contracts under these various canals have agreed to continue to take water from said canal as long as the canal cares to furnish it, or whether it is optional with them whether they take the water or not. This may cut quite a figure with our dealings in the Valley.

Mr. Happy, an attorney for the Ludy system, has called on me lately several times, with a view to negotiation with me about the Ludy system. I

have told him repeatedly that I did not care to go into any negotiations at which the association is not represented. He apparently does not care to include your people in these negotiations, but I will stand pat on this proposition. I have had some pretty stiff talks about the necessity of his company's dealing reasonably in the matter. I have advised him to confer with Judge Kibbie.

I wish to tell you privately that the Mexican Minister has filed a formal protest with the Department of State against our making any serious diversions from the Colorado River. The matter has been referred to me without comment by the Washington office. I certainly will not stop unless I am positively ordered to do so by the Department, and I do not believe that they will order me to do so.

I am enclosing you a statement of the lands signed under the Yuma Project. I am very anxious to get these lands signed up in sufficient number to satisfy the Board of Engineers, so that we can promptly advertise for bids before the State Department introduces any protest against our procedure. If we can only get the contracts let, I do not think that they will stop us at all.

Very truly,

J. B. LIPPINCOTT,
Supervising Engineer.

(Enclosure)

P. S.—The enclosure referred to above will be forwarded tomorrow.

J. C. AVAKION. [202]

**Plaintiffs' Exhibit No 31.**

DEPARTMENT OF THE INTERIOR.
UNITED STATES GEOLOGICAL SURVEY.
HYDROGRAPHIC DEPARTMENT.

Los Angeles, Cal., Sept. 27, 1904.

Mr. M. Winsor, Prest.,
Yuma County Water Users Assn.,
Yuma, Arizona.

Dear Sir:

I enclose to you a copy of a letter received from Mr. Newell, in reply to my question as to whether we should go into detailed examinations of titles in Yuma Valley. In accordance with his letter I would request that those on the mesa who have taken up lands subsequent to withdrawals should also sign contracts for 40 acres. (enc.)

Very truly yours,
J. B. LIPPINCOTT, (Signed)
Supervising Engineer.

(The annexed letter is part of this Exhibit 31.)

Copy.

Washington, D. C., Sept. 20, 1904.

Mr. J. B. Lippincott,
1108 Braly Building,
Los Angeles, Cal.

Dear Sir:

Yours of the 13th inst. has been received.

It is the duty of the Water Users Association to keep track of the status of all the lands in the district. This will be necessary at the present time

in order to verify the details of subscriptions and will also be required in the future operations in connection with water distribution and the issuance of stock. This is a necessary condition from the nature of the operations of the Water Users Association. An association is expected to keep up this abstract of its lands.

In case of contest it will of course be necessary to await the conclusion of the controversy before it will be possible to decide upon the true owners. There appears to be no objection, however, to both parties to the contest signing stock subscriptions.

It will, of course, be necessary for the officers of the Reclamation Service to check up the abstract of the Association sufficiently to be able to make a general report to the office as to the correctness of the representations of the Association. It will be sufficient for the Reclamation Service to determine for itself the land which was entered prior to the withdrawal, and in this way determine the tracts in the two classes of lands: First, those not subject to the provisions of the Reclamation Act without subscription of the owner, and second, those which are. It is, of course, understood that those who are in the second class should also become members of the Water Users Association in order that the Government may deal with all parties interested through the Association.

Your telegram of the 19th inst. has been received, as follows: "About 87% of area private lands Yuma Project now signed." I am pleased to know that such good progress is being made in obtaining sub-

(Testimony of Oscar P. Bondesson.)

scriptions from the owners of private lands.

Very respectfully,

F. H. NEWELL,

Chief Engineer. [203]

The WITNESS.—If I did not send those daily or frequent reports that I have spoken of the result would be that we would receive an inquiry from the Los Angeles office of Mr. Lippincott, the supervising engineer, asking about the progress of the signing up of the lands, and we continued until the ninety-eight per cent of the private land owners had signed up.

Cross-examination.

(By Mr. MORTON.)

Mr. MORTON.—If the Court please, just simply that we may understand the situation, I think it is clear this testimony, as I understand it, is admitted here subject to an objection, and the testimony that will be submitted along the same line will be subject to a similar objection, general objection as to incompetency, irrelevancy and immateriality, and that the objection shall go to all of this testimony and to the exhibits that have been introduced, and that that will be true as to subsequent testimony along the same line, and be argued later.

The COURT.—That is the understanding.

Mr. MORTON.—I just wanted to be clear on that point.

The WITNESS.—I am now living at the Southern Pacific Hotel in Yuma, Arizona, and have been since last fall, and before that I had been in Cali-

(Testimony of Oscar P. Bondesson.)

fornia during the summer of 1918. I have lived practically continuously in the Yuma Valley for a little more than twenty-one years. There was an interval of two years when I resided temporarily in Pasadena, but I was in the valley a great deal of the time. This interval that I refer to was from the fall of 1909 until, say, the spring of 1912. During that time, however, I was in the valley frequently and stayed for as much as two or three months at a time. I have leased by own place, not farming it. I did own two pieces of land. I now own one of them, the other has been sold, and I have purchased another piece of land, so I have the same acreage I had. The piece I have owned continuously I first went on it as an occupant on June 1, 1898, I filed on it when it was subject to entry after the question of whether or not it was public [204] land had been decided in the Supreme Court some two years afterwards, and later obtained patent for it, about five years afterwards. It was a homestead, and that has been my residence most all of the time—that and the town of Yuma. It is the southwest quarter of section 27, township 9 south, range 24 west, G. & S. R. Meridian, and it is below Yuma in the valley, in almost exactly the center of the valley as regards distance from Yuma to the river and from the line to the Mesa, and it is near the town of Somerton. The piece of land I sold was the northwest quarter of section 28, township 10 south, same range, and I sold it in the fall of 1907. I bought another piece of land on March 8, 1917. The land I sold was partially unimproved.

(Testimony of Oscar P. Bondesson.)

Twenty acres had been cleared and irrigated. It was a desert entry. The land I purchased about 2 years ago was not improved, and when I purchased that piece of land I did not have any definite knowledge that the cost of the project was more than $35.28 per acre. I knew in a general way that more money had been spent on the project than that amount. Up to the time that I ceased to be an officer of the association I had followed the progress of the work very closely. I did not myself personally make any objection to the additional expenditures. I certainly wanted the project completed at the earliest possible moment so as to enable me to irrigate my lands. In recent years I have had the benefit of the project works and of the water. Prior to the public notice of April 6, 1917, my ranch was being farmed on a share basis by a tenant, and we did obtain some water from what was known as the "Scoop Wheel." As a matter of fact I had been furnished with water from the project since about the year 1912 under the gravity system. Since shortly after the siphon was completed in 1912, within about six weeks of the time of the first turning of the water through the siphon I got water on my ranch from the siphon; that is, gravity water from Laguna dam. I have farmed all of the area of the land I have kept so long.

Mr. MORTON.—What kind of crops have you raised there?

Mr. MOLLOY.—It seems to me, if the Court

(Testimony of Oscar P. Bondesson.)

please, that is irrelevant and immaterial, and not proper cross-examination. [205]

Mr. MOLLOY.—We object for both of those reasons.

Mr. MORTON.—We can very readily explain the purpose of it, your Honor. There is a contention that these people would not have signed these agreements and would not have entered into this had they known that the price was to be of that character. The point is they will, as a matter of fact, secure benefits that are commensurate with the size of the works, and so that question is raised directly, or at least, the complaint says that none of these men, of which Mr. Bondesson is one, are able one year with another to stand the charges of seventy-five dollars an acre, and it is also pertinent in that particular. Mr. Bondesson has testified that he is one of the farmers there, that he is represented in this suit by the plaintiffs, and it is very clear, it seems to me, that he is subject to questions of this character. [206]

The COURT.—I will overrule the objection.

Mr. MOLLOY.—We except.

The WITNESS.—I farmed all the area of that land and I grew thereon alfalfa and grain crops, such as feterita, barley and cotton. My place is now rented.

Mr. MORTON.—Is it upon a cash basis?

WITNESS.—Yes, sir.

Mr. MOLLOY.—That is objected to as irrelevant and immaterial, and I move the answer be stricken

(Testimony of Oscar P. Bondesson.)

out until I have had a chance to make the objection.

The COURT.—Overruled.

Mr. MOLLOY.—Not proper cross-examination. It does not seem to me that anything that could happen after 1912 could affect what notice Mr. Bondesson and the other land owners had to enter into the contract of May 28, 1904, and during the summer of 1904.

Mr. MORTON.—It answers the same purpose identically as the other question.

The COURT.—Overruled.

The WITNESS.—I rent my land for $30 per acre per year, and the lessee pays for the maintenance charge. I get that for the rent of the land itself, and if there are any construction charges I would pay the construction charges but not the annual maintenance. I pay also my dues to the Water Users, which are nominal, very small, and taxes annually. I am not paying a construction charge at the present time as I am one of those who took advantage of the situation and made a temporary application for water service pending the determination of this suit.

Mr. MORTON.—Mr. Bondesson, do you recall at all the returns from your place in the last few years in the way of amount per acre, gross.

Mr. MOLLOY.—There is an objection for the same [207] reasons.

The COURT.—Overruled.

Mr. MOLLOY.—We except.

The WITNESS.—What particular crops do you refer to?

(Testimony of Oscar P. Bondesson.)

Mr. MORTON.—Taking your place as a whole, would you be able to state in any way about the amount per acre, gross, that has been produced on that place in money?

Mr. MOLLOY.—Same objection.

The COURT.—Same ruling.

Mr. MOLLOY.—Exception.

The COURT.—What is the gross revenue per acre?

The WITNESS.—I would not say. It is a difficult question, unless it was taken year by year.

Mr. MORTON.—Well, take the year 1916, Mr. Bondesson.

A. Yes, sir; 1916 was a year of large prices for produce. Cotton was beginning to be a pretty good price. As I remember it, I pastured my alfalfa lands in 1916 and received a gross revenue of close to thirty dollars per acre. That was gross.

Q. As to the crop lands?

A. That was as to the alfalfa, about one hundred acres or less was in alfalfa that year, and it brought me, as I remember it now, a little less than thirty dollars. It was pastured throughout the year to cattle.

Q. Was all the land in alfalfa at that time?

A. No.

Mr. MOLLOY.—We desire to point out to the court the immateriality and irrelevancy of this; that what happened in 1916 or at any time subsequent to 1912, or, in fact, that happened at any time subsequent to the distribution of the pamphlet and

(Testimony of Oscar P. Bondesson.)

the signing up of the lands by the numerous land owners, and subsequent to the contract that the counsel on the other side so confidently assert is unambiguous—anything that happened after that could not affect this law suit, and any testimony along that line whatsoever is irrelevant and immaterial. That [208] is our position and those are the reasons we urge in support of our objection to all this kind of testimony and except to the ruling admitting it.

The COURT.—Very well. I am also hearing it for another purpose, and that is that you have made an application here for an injunction *pendente lite,* and in the event that an appeal should be taken by either side it might become very material for this court to know all the facts in order to determine what order should be made in regard to that matter.

The WITNESS.—I am familiar with the regulations and actions of the Reclamation Service in securing crop returns every year; they used to come around for that purpose. I don't remember of having made any directly to them for the last two or three years, however, but I do remember that, say, three or four years ago they used to come around for that purpose. The water master used to come and ask about these things generally. I think that once or twice I made those returns upon the regular card and furnished them to them. The card that you show me discloses that it is my card and in my handwriting, and that the returns for my land per acre for the year 1916, according to this card, was practically thirty dollars per acre for the alfalfa in

(Testimony of Oscar P. Bondesson.)

round figures. There were sixty acres of cotton and seed. The gross returns is shown to be $8,640 for cotton, $1,400 for the cotton seed; in round numbers $10,000 for the sixty acres, gross return. The entire ranch would be a gross return of $13,000. The average value per acre stated appears to be $81.80.

Mr. MORTON.—This is a card which is a part of the official records of the project office, and I should like to offer it for introduction with the privilege of substituting a copy.

The COURT.—Any objection to that?

Mr. MOLLOY.—We object to it as irrelevant and immaterial for the reasons heretofore stated, and that it is not proper cross-examination. We have not asked this witness so far anything beyond a period of time ending in the fall of 1904. [209]

The COURT.—Well, I say, is there any objection to its being withdrawn and a copy submitted?

Mr. MOLLOY.—Oh, no, not at all, but I am objecting to its admission for the reasons stated. It seems to me that on this subject matter of the present examination that they should make this witness their own witness.

The COURT.—The objection is overruled.

Mr. MOLLOY.—Exception.

Paper introduced and marked by the Clerk Defendants' Exhibit No. 1 for Identification. The testimony disclosing contents of card, it is not incorporated here.

WITNESS.—I do not recall the figures for the returns upon my place for the year 1917, but it was

(Testimony of Oscar P. Bondesson.)

as large as that, if not a little more. 1917 was an exceptionally good year on account of high prices, and in 1918 I received thirty dollars an acre rent. It was rented in 1918 and is now rented; the entire 160 acres for thirty dollars per acre for 1918 and for this year. The lease runs for three years, which is practically net to me, except taxes, interest on the investment and that sort of thing. I have no figures for the year 1915. The returns were very much less, however, than in 1916. In 1915 prices were just beginning to advance. I had no cotton in 1915, and that has been the big money crop really. I had alfalfa and grain crops, but it was a paying proposition in that year.

Mr. MORTON.—Mr. Bondesson, on that place you have accepted the so-called extension act which provides for payment in twenty years rather than in ten years?

Mr. MOLLOY.—That is objected to for the reason it is irrelevant and immaterial.

The COURT.—What is the object of that?

Mr. MORTON.—If your Honor please, the extension act is an act of Congress that was passed in 1915.

The COURT.—I am familiar with the act. What is the relevancy of the testimony?

Mr. MORTON.—The act itself provides for a graduated payment scale and was passed for the benefit of settlers generally [210] over the country. It goes to the same point, that under the ten year's plan there would, of course, have been a

(Testimony of Oscar P. Bondesson.)

prompter and a larger payment every year. Under the extension act plan there is, for instance, that seventy-five dollars would only be a dollar and a half per acre per year for four years, and three dollars per acre per year on that for two years and four and a half dollars per acre per year for the balance of the twenty years in order to make up the payment for the balance of the period.

The COURT.—What has that got to do with the question as to whether or not they are liable for the amount that you claim the project has cost, between the actual cost and the sum which they claim was the estimated cost?

Mr. MORTON.—It goes directly to the point that has been made; that is that these places one year and another cannot afford to pay the charges that have been assessed under the public notice of 1917. Mr. Bondesson, of course, has referred to the fact that he is here in this valley, farming this land. He is one of the plaintiffs by representation and he is making a claim before this court over the verification in the complaint that he cannot afford one year with another to pay a dollar and a half a year, if he has accepted the extension act, three dollars per acre for two years after the four years have expired, and four and a half dollars per acre the rest of the time.

The COURT.—Well, he has offered no testimony along that line.

Mr. MORTON.—No, not directly along that particular line.

The COURT.—Well, then, why not wait until he

(Testimony of Oscar P. Bondesson.)

offers testimony in support of his allegation before attempting to refute it?

Mr. KING.—If the Court please, as I understand, part of the contention of the plaintiffs is to rely on the question of estoppel, and it is a well settled principle of law that one [211] cannot accept the benefits of an act and then refuse to bear the burdens. Now the act of these plaintiffs in accepting the benefits of the reclamation extension act constitutes under our contention a waiver of many things which they are questioning here in this case, and it goes to the question of estoppel.

The COURT.—Have they offered any testimony as yet on the question of estoppel?

Mr. KING.—Well, I understand that is one purpose that they had in offering the testimony to the effect that they wouldn't have entered these lands and signed up in the way they did if they had not thought it was only going to cost thirty dollars per acre. They went into that feature with a view of showing that they had been misled and been injured, showing that they had been misled and bee injured, and this testimony that has gone in on cross-examination here tends to show that they have not been prejudiced nor injured. And later the extension act was passed largely in the way of constituting a compromise between the settlers and the government, and they have accepted the benefits of that act and they cannot accept the benefits of the act and then refuse to bear the burdens of it, whatever they may be. In other words, it is in the

(Testimony of Oscar P. Bondesson.)

nature of an estoppel against an estoppel.

The COURT.—I sustain the objection. I do not think that works an estoppel. I do not think it tends to prove the value of the land or the income therefrom, and I permit the defendant to offer it under Rule 46 so that the appellate court may review it in case of an appeal.

Mr. KING.—We save an exception.

The COURT.—Now I am sustaining the objection and permitting the witness to answer under Rule 46, so that in the event an appeal is taken the appellate court may determine whether I have committed error in refusing to consider it for the purposes offered.

The WITNESS.—Yes, sir; I have applied to come under the extension act; yes, sir. [212]

Q. You are familiar with the way in which that act works, are you not?

A. In a general way; yes, sir.

Q. You know that seventy-five dollars, a charge of seventy-five dollars per acre would be distributed over twenty years, the first four years two per cent?

A. Yes, sir.

Q. The next two years four per cent?

A. Yes, sir.

Q. And the balance six per cent, do you not?

A. Yes, sir.

Q. That would make a dollar and a half an acre for the first four years, would it not, Mr. Bondesson? A. Yes, sir.

Q. You do not intend to imply at all that your

(Testimony of Oscar P. Bondesson.)

place would not be able to afford to pay the charges, do you?

A. Well, not at the present prices, or anywhere near it, we can pay the charge.

Q. What is your land worth now an acre, Mr. Bondesson? A. It is not on the market.

Q. Do you mean that you would not sell it?

A. No, I don't say that, but it is not offered for sale. That is what I mean by it. There is no price set.

The COURT.—The question is what is it worth?

Mr. MORTON.—What is it worth?

Mr. MOLLOY.—Objected to as irrelevant and immaterial, and as not proper cross-examination. It cannot affect the issues in this case what Mr. Bondesson's land happens to be worth now on the day of the trial.

The COURT.—Overruled.

The WITNESS.—I consider it worth to me $300 an acre.

Mr. MOLLOY.—I move the answer be stricken out as not responsive.

The COURT.—The question is what is it worth in the market; not what it is worth to you, to the best of your knowledge?

The WITNESS.—It would probably sell for some less [213] than that if I would offer it in the market, possibly anywhere from two hundred up, if the sale was expected to be consummated any way soon.

Mr. MORTON.—What did it cost you?

(Testimony of Oscar P. Bondesson.)

WITNESS.—Which land do you refer to?

Mr. MOLLOY.—Objected to for the same reason.

WITNESS.—That was the homestead. It cost me more than I will ever get for it, too, in time and labor.

Mr. MORTON.—It has been your home, hasn't it, all the time? A. Yes, sir; in a sense it has.

Q. At the time you refer to, on May 28, 1904, and during that year as a general rule what were land values down there per acre?

Mr. MOLLOY.—That is objected to as irrelevant, immaterial and not proper cross-examination. The Secretary of the Interior in fixing the estimate at forty dollars per acre fixed the estimate of the cost of this project, and it is utterly immaterial what the value of land was then or whether it had any value at all. Presumably the land would not have been worth very much anyhow unless the water was brought to it.

The COURT.—Overruled.

Mr. MOLLOY.—Exception.

The WITNESS.—Land had a value at that time of—well, it would depend on what state of cultivation it was in or whether it was clear or level. I would say raw land at that time was worth about around twenty-five dollars up.

The COURT.—How about cleared land?

A. It would depend upon the amount of labor that had been expended on it.

Mr. MORTON.—You mean raw land without any work done on it at all was worth twenty-five dollars?

(Testimony of Oscar P. Bondesson.)

A. Unimproved land was worth right around twenty-five dollars and up.

Q. On May 28, 1904? A. Yes, sir. [214]

Q. That was at the time that the project was being discussed, wasn't it? A. Yes, sir.

Q. The proposed project? A. Yes, sir.

Q. Had there been any increase in value by reason of the discussion and proposal to have the works there done by the Government, do you know?

Mr. MOLLOY.—Objected to for the same reason.

The COURT.—Overruled.

Mr. MOLLOY.—It would be impossible under the evidence in this case to segregate what increase in value there was that resulted from the talk or the prospect of the Government coming, or whether it was from the prospect of the Colorado Delta Canal Company coming in with their project. How is the witness or anyone to tell what caused the increase in value if there was any increase in value?

The COURT.—I believe you are right. I sustain the objection.

Mr. MORTON.—Exception, please.

The WITNESS.—Yes, I have testified that on May 2, 1904, there was a meeting held of the land owners for a general discussion for the purpose of deciding between the Government enterprise and another enterprise up the river, and I also stated that the canal systems that were then existent in there had proved rather unsatisfactory for lack of capital and for various reasons, one of the reasons of their being unsatisfactory was that they had

(Testimony of Oscar P. Bondesson.)

no adequate means of diverting water from the Colorado River, except by means of pumping. I remember the situation in the valley in connection with the annual floods of the Colorado River, and when the river was high the greater portion of the valley overflowed from the levee. In one sense it was a benefit to the earlier settlers. They could grow little crops after the overflow such as corn, melons and that sort of thing, but I absolutely do not think it would have been a good idea to have continued that way right along. Farming was then [215] certainly a difficult and precarious matter. Judging from my former experience and the experience of the people there with those irrigating systems that were there I had some reason to suppose that the Colorado Delta Canal Company would be better than the old systems. In the first place they seemed to be pretty well organized and connected with San Francisco capital; they brought into the field a corps of engineers and laid out more or less of a system of canals; they ran over them with a level; they proposed to divert the water in a better location, rock heading, so-called, higher up the river, and they appeared to a great many to be able to perhaps make a very satisfactory project, which, of course, depended directly upon their success in diverting the water and in keeping the river out of the valley. Their offer was fifteen dollars an acre for the water right and three dollars per annum for annual maintenance, which would entitle the land holder to three acre feet of water as a

(Testimony of Oscar P. Bondesson.)

maximum or minimum charge, whichever way you want to put it, a dollar an acre foot per year. They had a large levee provided for the protection of their works, which was inadequate for any other purpose. For myself I was studying both propositions, the Colorado Delta Canal Company and the United States Reclamation very closely, and had been for a number of months previous to that time. I was really hesitating between those two propositions until I knew just how the matter had shaped itself up. We intended to provide for the levees in some way eventually. As a matter of fact we had started a levee of our own. Generally speaking the fifteen dollar charge did not include any such thing as a levee. I don't think that the subject of drainage was discussed much at that time. The decision of the meeting was that it appeared that most of the people favored the Government enterprise. They believed that it would be better in the long run, safer.

It is very likely that I not only once but several times wrote a report in reply to a communication from the Director of the Reclamation Service upon the so-called Ludy canal. I was very busy at that time on those matters. It is [216] very likely that the request to do so came through the project manager.

Witness handed a carbon copy of a purported report of that character and time is given him to read it over so he may determine if he can identify it.

Mr. MORTON.—Mr. Bondesson, what was the

(Testimony of Oscar P. Bondesson.)

price of—as far as you know, of land down in the lower, in the Yuma Valley prior to that time, when, say, the reclamation act was passed in 1902.

Mr. MOLLOY.—Objected to as irrelevant and immaterial, not proper cross-examination, too remote, what happened prior to the passage of the Reclamation Act of June 17, 1902. We are dealing with the year 1904 and no other time.

The COURT.—What is the object and purpose of that testimony.

Mr. MORTON.—It is to show the value of the land prior to any proposal of the government to enter there, and the value of it at the present day. It has the same general purpose as the other questions with reference to land values.

The COURT.—I sustain the objection. I will permit you to ask it under Rule 46.

Mr. MORTON.—Do you know; I will ask you if you know, Mr. Bondesson, in any way?

A. I have a general knowledge, yes, sir.

Q. What was it about, would you say?

A. Well, again it would depend upon the state of cultivation and where it was situated, whether or not it received water from the pumping canal or any of the other canals, or where it was.

Q. Could you give figures within which it would run, say such figures for example as ten to twenty-five dollars, or something of that kind?

A. Yes, sir; in that case from ten to upwards of three hundred dollars an acre under the pumping plant. [217]

(Testimony of Oscar P. Bondesson.)

Q. And the three hundred dollars which you refer to, where would that be?

A. That would be in the upper end of the valley along the pumping plant, land in alfalfa or similar stuff and that sort of thing.

Q. That would be near Yuma, wouldn't it?

A. Well, it would be within three or four miles, small holdings.

Q. There wasn't very much of that land, was there?

A. Well, not as a percentage of the entire valley; no, sir. There was quite a little in the aggregate, however.

Q. What, if you know, would be the outside of that percentage; what figure would you name?

Mr. MOLLOY.—That is unfair, your Honor. I object to it for that reason. He proposes to strike off the high priced land, and get witness to fix an average.

The COURT.—I am sustaining your objections to all this testimony. This is admitted under Rule 46.

A. I might state at that time that a great deal of land was not yet patented and could not very well be sold. It was entries, homestead entries, mostly.

Mr. MORTON.—How about non-irrigated land, what was that worth?

A. Well, it would depend again upon the location, whether or not it was one place or another,

(Testimony of Oscar P. Bondesson.)

whether it was alkali, rough sand hills or smooth and level.

Q. Could you give any kind of an average at all?

A. Oh, right around twenty-five dollars, perhaps; that is, at some distance from town.

Q. That would be a maximum, wouldn't it, for unirrigated land?

A. Well, as I say, it would depend altogether—we have several different kinds of land in the valley, as to being rough. [218]

Q. Well, how does it compare with the present value of unirrigated land down there; at this time?

A. As to the present value?

Q. Yes; as to the unirrigated land in the valley.

A. Oh, it is very much less, naturally, very much less.

WITNESS (Resuming).—The printing of the pamphlet, Plaintiffs' Exhibit 15, was arranged for between my association and Mr. Lippincott. The Association paid for it. It was distributed at the suggestion of Mr. Lippincott that it might be a good thing to distribute something of the kind, and I would say that Mr. Lippincott had it printed for that purpose; he certainly did, but the association paid for it, on his suggestion. We paid for it, but we did not order it done. We authorized Mr. Lippincott to have it printed, and we offered to pay the expense in order to have it done promptly in order to have it in time for that meeting. I remember afterward in the correspondence that there was no

(Testimony of Oscar P. Bondesson.)

explicit mention of this pamphlet as a public notice under Section 4 of the Reclamation Act, but we certainly took it to be that.

Mr. MORTON.—Then you took a letter that was addressed to the Director of the Geological Survey by the Secretary of the Interior as a public notice under the Reclamation Act?

Mr. MOLLOY.—I think he is misstating the force and effect of the witness' answer. The witness' answer goes to the entire pamphlet as a whole, not to the letter of the Secretary of the Interior.

The COURT.—Well, he may explain his answer to this question.

Mr. MORTON.—Then your idea is, Mr. Molloy, that the public notice was issued by the Director of the Reclamation Service?

Mr. MOLLOY.—We contend that the whole pamphlet as printed and circulated under the circumstances constituted public notice under the section referred to. [219]

Mr. MORTON.—You are aware, of course, that your complaint contends that the letter of May 10th, 1904, is a public notice, aren't you, throughout?

Mr. MOLLOY.—No, indeed, we contend that the letter of May 10th, 1904, constituted the determination of the charges upon the estimated cost which is to be returned under Section 4 of the Reclamation Act. The letter of the Geological Survey dated May 10th, 1904, determined the charges upon the estimated cost. This letter and all the other letters

(Testimony of Oscar P. Bondesson.)

printed in the pamphlet that was circulated, under our theory, we contend constituted public notice. In everything that happened from April 28th, 1904, until the 28th day of May, 1904, constituted a contract made with the constituent members of the Yuma County Water Users' Association by the Government of the United States.

The COURT.—I think I understand your theory.

Mr. MORTON.—Then you are at variance with the allegations of the complaint if your theory is that.

Mr. MORTON.—Had you at that time read the Reclamation Act? A. Yes, sir.

Q. Were you fairly familiar with its terms?

A. I was, yes, sir.

Q. Were you aware of what had to be stated in a public notice of that character?

Mr. MOLLOY.—If the Court please, I object to this as purely irrelevant and immaterial, not proper cross-examination. We certainly did not place Mr. Bondesson upon the stand as a legal expert.

The COURT.—It rather calls for a conclusion, does it not?

Mr. MORTON.—All I have asked the witness so far, if your Honor please, is whether or not he is familiar with the terms of the Reclamation Act. In order to regard this as a public notice he must necessarily have to be familiar with it, because otherwise he would not be able to judge whether it was [220] anything at all.

The COURT.—Read the question.

(Testimony of Oscar P. Bondesson.)

(Question read.)

The COURT.—Objection sustained.

Mr. MORTON.—I take an exception.

WITNESS.—There were printed of the first issue of those pamphlets, one thousand. Then it was reprinted as many as two times by the association, while I was president, and I don't know whether it has been reprinted since or not. I am inclined to think it has not. It was the custom of either myself or the secretary to hand this pamphlet to various individuals that came and inquired about lands and I referred to it then in general terms as the public notice under Section 4 of the Reclamation Act. I told them in effect that it was a public notice under Section 4 of the Reclamation Act. By that I mean that that was exactly what we had expected under that Section 4. That is what we had to go on, and that is what we would have to pay and that is what we relied on.

Q. Mr. Bondesson, you spoke of purchasing a piece of land, I think it was in March, 1917. Do you wish the Court to understand that in purchasing that piece of land you were relying upon the cost of the project being $35.28 per acre, and that if you had then known it would be $75 per acre that you would never have made such a purchase down there?

Mr. MOLLOY.—I object to that as immaterial and irrelevant. That is not proper cross-examination. It is immaterial and irrelevant what hap-

(Testimony of Oscar P. Bondesson.)

pened when Mr. Bondesson bought that land in 1917.

The COURT.—Do you not claim that some of your plaintiffs have purchased land since the contracts were entered into?

Mr. MOLLOY.—No, your Honor, we have made no claim of that kind. That incidentally came out in the testimony, as I remember. Of course, it is a fact; it could not be denied, in [221] the nature of things that should be the case.

The COURT.—I will overrule the objection. He may answer the question.

Mr. MOLLOY.—Exception.

The WITNESS.—I will state as to the first part of the question that I did rely on the arrangement that had been made under that so-called public notice contained in that pamphlet. As to the other part of the question I would say that I probably would have bought the land anyway. As a matter of fact, I had bargained for that land nearly a year previous to the time I got the title in 1917, but it was the year before when I had bargained for it. Part of it was within an estate and had to be taken through the probate court, and there was a general advancement in the value of lands by reason of these high prices that I have mentioned, and I would have taken a chance and bought the land in any event.

At this time I owned all together in land in Yuma Valley, 320 acres less one acre, I think, for a right of way.

(Testimony of Oscar P. Bondesson.)

Mr. MOLLOY.—Before proceeding to ask any questions on redirect examination I move that all of the testimony of this witness concerning the value of his lands and the products and the crops, and all testimony of that nature, in 1916, 1917 and 1918 down to the present time, be stricken out for the reasons urged in the objections thereto. And I will supplement my motion by saying that this opens up a very large field that we had hoped it would be unnecessary to go into, and I think it is entirely improper in this case to go into it.

The COURT.—What part of the testimony do you refer to?

Mr. MOLLOY.—That is about the rent he is receiving now, what was the value of the crops, what he received for his crops in 1917, and anything of that nature. Now, if that sort of testimony is to stand, it compels us to open this sort of a field, that those are the fat years in the history of this project. Then we will have to go into the lean years. In the [222] nature of things we would have to bring what might be called a counterclaim against the Reclamation Service for the damage that is almost inevitable by not finishing that project. It is intimated in an answer made by Mr. Bondesson. The question was: "What did the land cost you?": Mr. Bondesson says: "It cost me more than I will ever get back in time and money." Now, your Honor will see where we are leading.

The COURT.—I have been thinking about the situation in this case and I thought that I would

(Testimony of Oscar P. Bondesson.)

like to offer this suggestion to counsel, that you introduce such testimony as may be necessary to enable the Court to determine the one vital question in the case, and that is whether there was such public notice given in 1904 as was binding upon the Government. In the event that the Court holds that no such notice was given, and that no such notice was given until 1917 that ends the whole case so far as this court is concerned. In the event that I hold, should hold that such a notice was given at that time, then it may be necessary to go into all these other matters which have been mentioned.

Mr. MORTON.—If your Honor please, we believe that you could readily determine the point that you mention now under the objections that we have made to all of this testimony, our general objections. Whenever we are allowed to present the matter in detail, I am convinced myself that there is enough before your Honor now, and more than enough, to determine whether or not public notice, legal and effective, was made at any time prior to April 6th, 1917.

The COURT.—If it is satisfactory to you gentlemen, counsel for the plaintiffs may be permitted to introduce any testimony along that line that he may have, if he has any, and then you may argue that one question. However, if you think it is necessary to try the case in all its phases, on all the issues, you may do so, but I would not be prepared to decide the case finally on your objections to the testimony, immediatetly.

(Testimony of Oscar P. Bondesson.)

Mr. MORTON.—We, of course, will be guided by your [223] Honor's desires. We do feel, however, if your Honor please, if these witnesses are brought upon the stand that, of course, we should have a reasonable opportunity to cross-examine them as we have done in this instance.

The COURT.—You may proceed to introduce such testimony, Mr. Molloy, as you desire to on these two questions so as to fairly present them to the Court, and so as to make your record for use in the future, if necessary.

Mr. MOLLOY.—Yes, your Honor, and, of course, we are overlooking a third point, that is about the completion of the project. So far as we are concerned, our testimony on that point will be very brief, and I think we ought to keep that in mind. I shall now ask Mr. Bondesson a few questions on what I deem to be proper redirect, and I take it you will not pass at this time on my motion to strike out the testimony in regard to the value of the land.

The COURT.—No, the ruling will be reserved on that motion.

Mr. MOLLOY.—Of course, in the meantime I shall refrain from asking any questions along that line.

The COURT.—In other words, if we have to try this case on all of these issues I will permit you to recall this witness for further examination if you so desire. I am inclined to think that the decision of those two questions will settle the case, one way or the other.

(Testimony of Oscar P. Bondesson.)

Redirect Examination

Of the witness Bondesson.

WITNESS.—In explanation of why the plaintiff corporation paid for the printing of the pamphlet I would state that it was the desire of both the Reclamation officials and the association to get action as quickly as possible. We needed very much this enterprise, and Mr. Lippincott explained in one of his letters, and, I think, orally, to myself, that if this was printed in Washington, in the Government printing office, it would probably be considerable [224] time before it could be circulated, and they wanted to get action now immediately, get busy. They had the money and they wanted to go to work, and he said if we would pay for the publication that he would have it done at once in Los Angeles and have it sent down for this particular meeting to meet the people and discuss it with them. Mr. Lippincott's letter, I think, states that there was no money in the hands of the Reclamation Service for the purpose of printing the pamphlet, but as to that I could not say. The assumption was that all Government printing had to be done at Washington.

Recross-examination of the Witness Bondesson.

WITNESS.—I recognize the letter handed me before lunch as a copy of a letter or report which I made on the Ludy canal, and I stated in that report that "The condition was, indeed, deplorable when in the summer of 1902 the Reclamation law was passed. The settlers being almost worn out with strife and practically threadbare as regards

(Testimony of Oscar P. Bondesson.)

finances, hailed with delight the coming of Federal aid. Gladly did they for a time forget past conditions and began to at once call loudly for aid from the Reclamation Service." And in answer to and in comment upon another letter where it is claimed that the first thing the Government officials did was to start a campaign against the private company I stated "the alleged complaint as above is absolutely untrue as regards Government officials. The so-called campaign or agitation for Government reclamation of the valley was carried on exclusively by the farmers themselves, who knew by that time what they wanted." And in the conclusion of the letter I stated: "We are borrowers from the National Government of a vast sum of money which must eventually be paid back and that the Secretary of the Interior is but the custodian or trustee of these funds which are being invested to our use," which was my understanding. [225]

Mr. MOLLOY.—And still our understanding, Mr. Morton.

WITNESS.—I am familiar with the contract that was entered into between the Secretary of the Interior and the association, and I am aware that the provision in the contract in the latter part of Article Three, reading, "The Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid. His determination to be made upon due and expert consideration of all available data and to be passed upon and measured and limited by the beneficial use of water," and I

(Testimony of Oscar P. Bondesson.)

know of no objection being made to that provision. I remember the provision in Article Five of the contract as follows: "Said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct and hereby guarantees the payment for that part of the cost of the irrigation work which shall be apportioned by the Secretary of the Interior to its shareholders," and I don't know o fthat being protested by anybody.

Redirect Examination

Of the witness Bondesson:

In answer to Mr. Molloy, the witness resumes:

WITNESS.—As a matter of fact, the whole contract was submitted to a vote of the constituent water users at a meeting in 1906; I don't remember the date—the fall, I believe, and after the date of the contract. The contract was prepared in this form in 1904, but had been delayed in getting to the voters because there was sought to be injected new features in the contract in relation to the inclusion of the Mesa, I believe, and perhaps some other features which I don't now recall.

The COURT.—When was it voted upon?

Mr. MOLLOY.—The date of the contract was 1906.

WITNESS.—(Reading from minutes.) It was submitted afterwards.

The COURT.—That was the contract that was eventually signed? [226]

(Testimony of Oscar P. Bondesson.)

Mr. MOLLOY.—Yes. The only written contract is appended as an exhibit to the amended complaint.

The WITNESS (Reading from the minutes): I find here a date of March 5th, 1906, where an amendment was agreed to by the Board of Governors by resolution spread upon the minutes.

The COURT.—Well, I don't know as the exact date would be material; it was after May, 1904, even after May, 1906, or May, 1907.

WITNESS.—It was some little time before they got the thing in shape. In any event the work was progressing on the project when the contract was entered into. The letter concerning which Mr. Morton has interrogated me appears to be dated March 9, 1908, and was written by me as president of the Water Users' Association to Mr. F. L. Sellew, the circumstances which brought forth the letter were that Mr. Sellew came into our office—we had offices in the same building—with a letter from some second or third or fourth Assistant Secretary of the Interior with a copy of a letter from President Roosevelt to the Secretary asking for information about the way the Reclamation Service had dealt with a private canal company in the Yuma Valley, and Mr. Sellew asked me if I would write something on the historical part, and he would write something on the engineering. And we did. It was done hurriedly, as they wanted a reply immediately. It related specifically to the controversy between the United States of America and the Irri-

(Testimony of Oscar P. Bondesson.)

gation Land and Improvement Company referred to in here as the Ludy people, concerning whether or not the United States, acting through its Reclamation Service, should or should not purchase, at a large bonus, property holdings and claims of the Irrigation Land and Improvement Company. It appears that their attorney had appeared before the President and sought political aid. Mr. Sellew appealed for aid on the other side of the controversy.

WITNESS.—I think if the letter was read as an entirety it would explain itself. So far as I know there is nothing in the letter that controverts any testimony I have given. [227]

Mr. MOLLOY.—It is a very long letter.

The COURT.—I can read it without it being read in the record. I am inclined to agree with the witness that the letter will speak for itself.

WITNESS.—A portion of the letter is "We take the liberty of again renewing our protest to any purchase of the Ludy Canal merely to get them out of the way." That is the scheme I was opposing; that is, the Ludy people thought they should receive something to leave the field open to the United States. That was their contention. We had a reason and an interest whether or not the United States purchased the Ludy system. We took the position that we did or would owe the United States Government three million dollars or less. The amount less would depend upon just such matters as this is as to whether they had to pay more than

(Testimony of Oscar P. Bondesson.)

the thing was worth for rights of way and such things. We expected it to be less, and that feature of the case was talked over specifically between the association and the officers of the Government at the time the consulting engineers met at Government headquarters. The maximum was three million dollars, and it might be reduced. That was our understanding, and when I wrote this letter I still expected it might possibly be less than three million dollars.

Mr. MOLLOY.—The letter may be offered in evidence so far as we are concerned. (Said letter was marked Plaintiffs' Exhibit 32.)

The COURT.—Any objection?

Mr. MORTON.—Except under the general rule. (This letter Plaintiffs' Exhibit 32, not being deemed relevant or material, to the matters in controversy in this appeal, it is not set forth here.)

Recross-examination.

By Mr. MORTON.

The WITNESS.—When this letter was written and even at the time of the issuance of what I have called the public notice [228] I didn't regard the charge per acre as fixed as to the exact sum. I expected to get the benefit of the actual reduction without regard to the cost.

**Testimony of Fred L. Ingraham, for Plaintiffs.**

FRED L. INGRAHAM, who is called as a witness, sworn, and examined by Mr. Molloy, as follows:

(Testimony of Fred L. Ingraham.)

My name is Fred L. Ingraham, and I reside in Yuma, Yuma County, Arizona, and hold there the official position of Judge of the Superior Court of that county. I am a constituent member of the plaintiff corporation in this case, one of its shareholders, and am a charter member and an incorporator thereof, and I am the Fred L. Ingraham whose name appears on the pleadings in this case as attorney for the plaintiff, but I am no longer connected with the case, because of being elevated to the Bench. In 1904 I was residing in Yuma, Yuma County, Arizona, and was then the owner of a homestead, the northeast quarter of 25, township 10 south, range 25 west, G. & S. R. Meridian, in that county, and about that time I acquired 160 acres of land lying next south of it. I am the Fred L. Ingraham whose name appears on one of the plaintiffs' plats. During the years 1903 and 1904 I was local attorney for the plaintiff corporation. Judge Kibby, of Phoenix, afterwards Governor Kibby, was the chief counsel. I participated in the organization of the association, and the reason it was organized was that the representatives of the Government, of whom J. B. Lippincott, engineer, was one of the chief, represented to us that, as land holders in the Yuma Valley, it would be necessary to form such an organization in order to enter into a contract with the United States Government. In accepting this advice we proceeded to follow the Salt River Valley idea, whose articles had the ap-

(Testimony of Fred L. Ingraham.)

proval, as I understood, of the officers of the Reclamation Service. Anyway, we did organize under what I understood to be the regulations of the Reclamation Service. There were numerous conferences with the officers of the United States with relation [229] to the furtherance of the securing of a Government project for that valley. In the spring of 1904 the Colorado Delta Canal Company became quite active in relation to a proposition which they were making to the land holders of the Yuma Valley concerning the construction of a project which had been referred to by the witness, Mr. Bondesson. They were, along about April of that year, getting some signers to their contract. We already had three irrigation companies in the Yuma Valley, and the situation from a standpoint of an opening by the Government was very complicated. One of the chief duties that I had as local counsel and that the Board of Directors or Governors of the Water Users' Association had was to try to make some arrangements with these various water companies that were already on the ground by which they might get out of the field and leave the way open for a Government project. And we felt that this Colorado Delta Canal Company might be a stumbling block in the way, and the Government engineers, as I remember, particularly Mr. Lippincott, was of the same opinion and that proposition or controversy—I do not wish to use the word controversy either—the negotiations between the Government and the Water Users' Association should

(Testimony of Fred L. Ingraham.)

be hastened along and brought to a conclusion in order that we might decide this matter before the field was complicated by this additional water company, the Colorado Delta Canal Company. Therefore, this letter which has been introduced in evidence, written by Mr. Winsor, president of the Water Users' Association, and, of course, on behalf of the Association, asking for the results of the preliminary surveys, the plans and estimates by Government engineers, and the cost of construction, etc., should be written and in that way the matters opened for a negotiation more formally than they had been.

Mr. KING.—If the Court please, we wish to strike this out as incompetent, irrelevant and immaterial, and to ask at this time if the same general objections may follow without [230] making them each time?

The COURT.— This being along the same line, that may be understood. The testimony will be received subject to the objection.

WITNESS.—I had familiarized myself with the provisions of the Reclamation Act of June 17, 1902, as a preliminary to all these negotiations. The contract of the Colorado Delta Canal Company I refer to is Plaintiffs' Exhibit 18. As between the proposed project of the Government and the Delta, individually my attitude was to wait and see what might be offered to us by anybody. The Colorado Delta Company was on the ground offering inducements for signers to their contract. In the preparation of the letter of the president of the association, as I have

(Testimony of Fred L. Ingraham.)

testified to, I am sure I read it over before it was signed, and in that way approved of it, although I do not think I had anything to do with the drafting or composition of it. I would say that Mr. Lippincott was active in making suggestions to the Water Users' Association and he being on the inside of the Reclamation Service and knowing how they desired to proceed—that is, the red tape of the organization of the department—he suggested a great many things and suggested that we make this advance to the government of the United States. The exact wording of the letter was not his dictation. I was present at a public meeting on April 8, 1904, before the Board of Consulting Engineers, headed by Mr. Arthur P. Davis, now the director of the Reclamation Service. The general effect of the announcement by the Board was that they had carefully gone over the plans, surveys and estimates, and that they had approved the plans for the Yuma project. They explained the engineering features of the project to a certain extent in a brief way to be understood by farmers and persons who were not engineers; that the result of their estimates was that the project would not cost more than thirty-five dollars per acre; that they had made their plans and estimates very liberal, and [231] they did not believe the cost could possibly exceed thirty-five dollars per acre. At the same time they gave us this information I believe they stated to us that the Secretary had added a margin of five dollars, making it forty dollars per acre.

(Testimony of Fred L. Ingraham.)

There was a statement there in regard to the actual water charge that it would not exceed one dollar per acre per year, and probably would be as low as fifty cents per acre per year which we considered remarkably low, and the construction charge has been considerably higher than we had anticipated. Not being a secretarial officer of the Association, only advisory in legal matters, I did not have as much information as others. The next I knew of it was the announcement that there would be a meeting held on the 27th or 28th day of May, 1904, and their requesting a mass meeting—a meeting not only of the officers, but a mass meeting which should include so far as possible every land holder in the valley, for the purpose of holding a public discussion, at which the people might decide whether they would execute this lien which the government asked to secure the estimated cost of the construction of the project. To advertise this meeting there were handbills circulated, and the usual means of advertising meetings of that kind from information of mouth to ear, which in my judgment, and as events proved, was very effective; practically every family in the valley—every land holder was represented by somebody of mature age capable of considering the facts presented. Plaintiffs' Exhibit 15, which I now hold in my hand, was a document which was circulated by the officers of the Water Users' Association and delivered to practically every land holder in the valley upon the day of that meeting, and the distribution was continued after that meeting for a considerable time.

(Testimony of Fred L. Ingraham.)

It was the propaganda upon which they based this effort to sign up, as we expressed it, a large percentage of the land in the valley which finally reached about ninety-eight per cent. It was used in securing signatures on May 28, 1904, and then after that, after we had complied with the requirement of the government and as we understood it had entered into obligations for [232] the construction of the work for the carrying out of the contract, it was used to explain to persons who might desire to purchase lands in the Yuma Valley, or were interested in the development of the country, to explain to them the relation that existed between the government and the Water Users' Association, or land holders. I received a copy of it on May 28, 1904, and I then read it. I was consulted by the officers of the Yuma County Water Users' Association and the land holders concerning this pamphlet and its force and effect under the Reclamation law. We didn't talk of much else. It was a tremendous topic in that country for several weeks, and, in fact, it is a topic of controversy yet.

Mr. MOLLOY.—Did you counsel or advise any of the members of the Water Users Association as to the effect of this pamphlet?

A. Yes, I did.

Mr. MORTON.—We object to that.

The COURT.—Well, I don't know what he may state. I think he may have said what he thought the legal effect of the document was.

Mr. MORTON.—They are asking him to state what he told others the effect was.

(Testimony of Fred L. Ingraham.)

The COURT.—That would be giving his legal opinion of the document. I will permit you to introduce it under Rule 46.

Objection sustained.

Q. You may answer the question.

A. It is already answered. I said yes.

Q. What did you tell them—the people generally?

Mr. MORTON.—Objected to on the same grounds.

The COURT.—Same ruling.

A. Well it is a little hard to boil a long discussion down into a few words. I told them that the effect of the situation between the Water Users Association and the Government gave rise to a contract if we should secure the proper [233] percentage of signatures of land holders in the valley and the construction work proceeded on that basis. I told them it gave rise to a contract and that we would be bound to carry out the Reclamation Law. That is, I considered this as a statement—which has been referred to as a pamphlet—as a statement of the estimated cost of the construction of the project and that is what we would be bound by under the Reclamation Act, providing of course, we got the proper percentage of signatures and completed our contracted relation.

The land holders to whom the pamphlets were distributed were the parties attending the mass meeting which was held at Yuma, Arizona, on the evening of May 28, 1904, in the Elks Hall in the hotel building, at which I was present. As I said, practically every family that was interested in a tract of land in the Yuma Valley was represented by some person capa-

(Testimony of Fred L. Ingraham.)

ble of considering the matter submitted at that meeting. It was considered a very important meeting. It also included the owners of land in the Gila Valley. The meeting was conducted by Mr. Winsor, the president of the Water Users' Association, as chairman, and it was somewhat of a public meeting, and there were several speakers. Mr. Newell, at the time head of the Geological Survey, was one of the principal speakers, followed by Mr. Lippincott; Judge Kibbey, representing the association, also spoke. Mr. Smythe of San Diego, one time a member of Congress from the Southern California District—but he didn't assume to represent anybody, but spoke upon the popular phases of the arid Southwest. I might explain the situation by saying that the proposition of the Delta Canal Company was in the back of everybody's mind and some of the local irrigation companies already in the field had not been very favorable to the Government advances and there was an effort on the part of the persons who represented the Reclamation Service—Mr. Newell and Mr. Lippincott—to meet the arguments that were advanced by the Delta Canal Company and other private companies and to convince [234] the people—the land holders—that they should execute this lien on their lands to the Government and should undertake what was necessary for them to do in the securing of the project in Yuma. So Mr. Newell stated that the Government was ready to begin work, there was no "distant future" about this business. They were going to *do it now,* if we were ready to enter into a

(Testimony of Fred L. Ingraham.)

contract—that if the land holders would execute this lien upon their land that "dirt would begin to fly in a very short time." I think they said sixty days, and that the work would be completed and the water on the land inside of two years. Mr. Newell, I remember, entered into a discussion of how that might be accomplished; that there would be some difficulty, but the only difficulty in the way of a quick construction was the construction of a weir or what was called the Laguna Dam. The work on there, particularly where the excavation of rock was to be made, was limited, for only a certain amount of men and machinery could be crowded into that narrow space and therefore time would have to be given, but the other parts of the project, levees, canals, laterals and drainage systems, were simply a matter of employing a large number of teams and men and keeping at it at the same time the dam was under construction, and there was no reason why it could not be completed in two years; and he staked his reputation as an engineer that it could be completed in two years. There was also a discussion of the cost, and the same representations as to this, and the statement that the estimates had been very liberal. I am quoting Mr. Newell now, who stated that it would be constructed, in his opinion, for less than thirty-five dollars per acre. The Secretary had added an extra five dollars for emergency, making an estimate of forty dollars per acre. Mr. Newell also stated that he represented the Secretary of the Interior—the Reclamation Service we call them—the Secretary of the Interior

(Testimony of Fred L. Ingraham.)

is the officer; and Mr. Lippincott practically stated the same thing. They both represented the Secretary of the Interior in this matter of presenting to the land holders an [235] offer that we might accept. Mr. Newell probably spoke for three-quarters of an hour and that was thirteen or fourteen years ago and I can only give the general effect of it from memory. There might be a little confusion too as to who said certain things—whether Mr. Lippincott or Mr. Newell. They both represented the Government of the United States to us. Mr. Lippincott discussed the matter of the plans and estimates and the cost and explained certain matters in the pamphlet. I remember Mr. Lippincott's going into the silt problem. Now, again referring to what was in the mind of everyone, or there was a general feeling that perhaps the Delta people would not be able to handle the silt in the Colorado river, for sometimes the water is so muddy, if you draw a pail full of water and let it stand over night, there will be three or four inches of mud in the morning. That means a tremendous deposit in the canals. Mr. Lippincott in his talk explained the method of the Government in eliminating the silt from the water by means of slowing up the water in the stream—drawing off the upper surface only, the muddier portion of the water going to the bottom, and then the first half mile or such a matter of the canal was to be constructed about four times as broad as the remaining portions of the canal and considerably deeper; to have sluice gates at the lower end and to be constructed in such a way

(Testimony of Fred L. Ingraham.)

that a tremendous body of water could be thrown through this first portion of the canal, say a half mile. Both Mr. Lippincott and Mr. Newell touched on the same feature of the cost. Of course, the cost was the main thing with the land holders. First, how much was it going to cost, the second thing before he signed was, what are we going to get for that, and the purpose of the pamphlet was to answer that question. When I speak of signing I mean a certain stock certificate which has been introduced as an exhibit in this case, subject to certain objections, which is the joint effort of the attorneys for the association and the attorneys for the Government. There is another one of the same nature of instruments actually executed by Mr. Bondesson and his wife Alice, [236] which is now handed me, which has been introduced in evidence as Plaintiffs' Exhibit 27, and it appears from Mr. Bondesson's testimony and the form of the certificate itself that there was something inserted at the suggestion of Mr. Morris Bien, attorney for the Reclamation Service, and it is in both of these contracts. I see no difference in the blank form of contract introduced in evidence and the one actually signed by Mr. Bondesson. They both contained the statement "And I hereby agree to subscribe to the said Articles or to a copy thereof upon request of the said Association." The attorneys I refer to are Judge Kibby, Mr. Bien and myself, and that insertion occurred on the same day of the meeting of the Board of Engineers, or on the 27th or 28th of May, 1904. Anyway, it was in con-

(Testimony of Fred L. Ingraham.)

nection with the negotiations growing out of the visit of the Government officials to Yuma, and also of Judge Kibby to Yuma. I was present at the meeting of the officers of the association on the morning of May 28, 1904, concerning which Mr. Bondesson read from the minutes of the association. I was interested in all those matters and followed it very closely. As to the meeting at which Mr. Newell, Mr. Lippincott, Mr. Kibby and Mr. Smythe spoke, my recollection is that Mr. Lippincott was the last speaker. He had rather a ready and popular way with him and he was assigned for the last person on the program and his closing statement was an appeal for the signatures to these lien contracts. His statement was that the Government had completed their part of the work up to the present and was ready to begin the construction of the Yuma project, and he says, "Now boys, are you with us? It is up to you," and that was the end of his speech. He was responded to immediately, I believe, by W. H. De Berry, who also has a popular and ready style, by saying "Yes, we are with you. Come on boys." Something to that effect. As a matter of fact, they had notaries public—several of them—in the anteroom or the hall and there was a rush to sign up the lien contracts and there were several thousand acres signed up that night. Mr. De Berry, I believe, is one [237] of the incorporators of the Water Users' Association, and was at that time the owner of a section of land, and a member of the board of governors of the association. He was an organizer of what

(Testimony of Fred L. Ingraham.)

was called the American Canal Company, one of the local companies in the field, and he was one of the most influential men in the valley. He was also a large stockholder, and still a controlling stockholder, in the Ludy system, but that is based upon popular impression. I do not know as to the fact of his ownership of the stock. I signed up my land about that time. I was induced to pledge my land and place a lien on it by the representations made through Mr. Newell and Mr. Lippincott and the pamphlet signed by Mr. Newell. Then, too, this letter of the Secretary of the Interior as to the three million dollars, and estimating the cost of the project not to exceed forty dollars per acre. I had never seen a certified copy of that, but I was led to act on the representations of this pamphlet. If I could have forseen that instead of costing me thirty-five dollars per acre, or possibly forty dollars at the outside, and that it would have taken some thirteen or fourteen years instead of two years, I would not then have signed one of those liens and executed one of those contracts upon my land. If there was no estimated or limited cost which we agreed to pay, then the execution of this lien amounted on the part of the land owners to a gift of their pocketbooks, saying "Take this and do as you will with it." That is the way I viewed it at that time, and that is the way I advised other people, and Judge Kibby coincided with my views and sent his opinion to the same effect to the Water Users' Association.

Q. Did Mr. Bien coincide with you?

(Testimony of Fred L. Ingraham.)

A. This phase was never discussed with him. Witness: We all understood we were putting a lien on our land. Mr. Bien criticised the contract before its amendment by saying, "The signing of this contract is not a subscription," and therefore he substituted an agreement to subscribe to the Articles of Incorporation.

Cross-examination.

By Mr. Morton:

We considered it would add another complication [238] if the Colorado Delta System should get too far along with their contracts. That is, this was like an election, you have to carry it by the number of votes and we had to get the votes and we thought the Government irrigation project might be a good thing if they offered us the proper prices, and I was active in proceeding in such a way as I could in order to avoid this complication with them. We had been operating along that line for several months. The first meeting was held in my office along the latter part of August of the year preceding, looking toward an organization. So far as in reference to the Water Users' Association, the whole life of the association was that if we didn't enter into relations with the Government, of course, it would be lost work. I remember the contract with the Government of May 31, 1906, between the association and the Secretary of the Interior. I remember of no other contract being signed by the Water Users' Association since that one.

I have referred to the fact that these gentlemen

(Testimony of Fred L. Ingraham.)

Mr. Newell and Mr. Lippincott stated that they thought the project might be constructed for less than thirty-five dollars per acre. I considered that as the public representation and that the binding statement was contained in this written pamphlet; that stated an absolute figure, forty dollars an acre. That was the maximum as I understood it, but I understood that was what we would have to pay; just how any project would get money back for a project constructed for less than the estimated cost I don't know; I don't think they would have any claim except perhaps through Congress or the Legislative Department.

Mr. MORTON.—How much land do you own under the project, or in the Yuma valley?

Mr. MOLLOY.—That is irrelevant and immaterial at this time and not proper cross-examination and it seems to be outside of the quasi agreement entered into at noon.

The COURT.—I think you may state. [239]

Mr. MOLLOY.—Except.

WITNESS.—I own 133.6 acres lying about four miles west of the town of Yuma. I own 160 acres in 10–25, in the Yuma valley. I own some lots in the town of Yuma, and forty acres in the Gila valley which was at one time in the project, and is now announced by the Reclamation Service not to be in the project as I understand it. Neither of these pieces of land is my homestead that I referred to in my testimony. I sold my homestead; the deed passed, I believe, the first of January this year, but the con-

(Testimony of Fred L. Ingraham.)

tract was entered into perhaps thirteen years before that. I purchased the 160 acres in 1904 or 1905, and the 133.6 acres about seven or eight years ago. I farmed that piece part of the time myself. It is leased now, and the 160 acres is leased on share of crop. The lessee pays the water charges on the southern piece; on the 133.6 acres he pays part of them and part of the land is wild, and he pays for the irrigated part, and I have to pay what represents the wild part. There are 16,000 acres on California side perhaps 9/10 this in cultivation. There are 51,000 acres in the Yuma valley, with I should say possibly one-tenth of it wild, roughly estimating from riding over the valley. The rest is being actually cultivated. There might be one-eighth of wild land, but susceptible of irrigation.

**Testimony of William H. Lyon, for Plaintiffs.**

WILLIAM H. LYON was called as a witness on behalf of plaintiff, and being duly sworn, testified as follows:

My name is William H. Lyon. I reside at Riverside, California, and have resided there about three years. I formerly resided in the Yuma valley, Arizona, from 1897 until three years ago. In 1904 I was an entryman on the southeast quarter of section 35, township 8 south, range 24 west, shown on one of plaintiffs' plats. In the year 1903 and the beginning of 1904 the Ludy canal, the Farmers Gravity Canal, and the pumping plant canal were in operation, and there was the prospective project of the Colorado

(Testimony of William H. Lyon.)

Delta Canal Company which was promising to irrigate the Colorado and Gila valleys and the Mesa. I have seen the map which is in evidence here as Plaintiffs' Exhibit 17. [240] It and other maps were circulated among the farmers over the country to show them where canals and pumping plants would be. I was connected with the Colorado Delta Canal Company in that I had a little financial interest in what is known as the Rockland Canal, which was afterwards sold to the Colorado Delta Canal Company, and I received a salary for a while from the Colorado people. John M. Speese was interested in the Rockland Canal which ran down the Gila valley and across the Gila River, to irrigate the whole country down there, including as to valley land the same territory as was afterwards proposed to be covered by the Colorado Delta Canal Company. They sold out to the Colorado Delta Canal Company, and I was in the employ of the last named company. And I was engaged in getting signers for their contracts, but did not get signers to any great extent. I refer to plaintiffs' exhibit 18, which is here for the purpose of showing a sample contract—specifically it is a certain contract between the Delta Company and one James W. Tucker. I didn't get very far in getting signers because about the time we were well started with it there was a great deal of talk about the Government coming in and putting in an irrigation system and the people held up on the signing of the contract pending the decision of the Reclamation engineers. They had been in there about a year

(Testimony of William H. Lyon.)

making geological surveys over the valleys, and I first knew that they had reached a decision in the spring of 1904, about April. My attention was called to it by Mr. Marvin stating that there would be a meeting of the Board of Consulting Advisory Engineers of the Water Users' Association, the names of some of whom I recall.

Mr. MORTON.—We ask that this be regarded as coming under the general objection to the testimony.

WITNESS.—Some of the names that I remember are Mr. Hall, Mr. Savage, Mr. Davis, and Mr. Saunders. I refer to a meeting preceding the meeting at which Mr. Newell and Mr. Lippincott spoke, that was held by the Water Users' Association. I can also name Mr. Wisner or Winsor, and there was also a gentleman [241] by the name of J. H. Quinton. I attended the meeting.

Q. Tell us as near as you recollect what happened there in connection with the Yuma, or proposed Yuma project?

The COURT.—Do you claim that these men are authorized to make statements which should be binding upon the Government where a supposed estimate was made?

Mr. MOLLOY.—I am not at all sure it would bind the Government, but shows the care that was taken by the Government to apprise the land owners they were not buying a pig in a poke.

Mr. MORTON.—That is not at all relevant or material, and is extraneous to this investigation.

(Testimony of William H. Lyon.)

The COURT.—But it would not bind the Secretary of the Interior.

Mr. MOLLOY.—But he having made it a point to arrive at estimates, it certainly must, in the nature of things, whatever might have been its legal effect on the United States, it certainly must have been a great inducement to them, to eventually get them to lien their land.

The COURT.—Well, that would mean, of course, that every statement made by any one of those engineers relative to the cost during the entire time of this survey could be introduced. I admit it under Rule 46, but I sustain the objection as to it being immaterial; it seems to me it is consuming time.

The WITNESS.—I believe that it was Mr. Wisner that made some talk along the lines of the cost of the project. He said among other things that thirty-five dollars was a very high cost, and wanted to know if there was a possibility of getting the farmers to sign up. It seemed to be the opinion of the board that the farmers were not entirely satisfied as to whether or not they could stand that much money. There was considerable talk that on account of the limited acreage they must have all the land signed—practically all of it. There was quite a lot of discussion, but they all said about the same thing and that ended the negotiations. I have seen the pamphlet—Plaintiffs' Exhibit [242] 15, now handed me. I saw it at the meeting at the Gandolfo Hall, at Yuma, on May 28, 1904, about

(Testimony of William H. Lyon.)

six weeks or something more after the meeting of the consulting engineers. Mr. Marvin or somebody handed me the pamphlet. I did not read it at the time. I read it afterwards. Mr. Newell, Mr. Smythe, Judge Kibby and Mr. Lippincott spoke at the meeting. Mr. Newell made a speech on the possibility of the Government putting in the irrigation canals and he said among other things that we had private concerns in there and we did not know whether they were responsible or not, that they might start and fall down on it, but "you do know the Government is reliable and responsible. We propose to put the works in there for say thirty-five dollars an acre or not to exceed forty dollars. I will say thirty-five dollars, but it may possibly cost you forty dollars." And he held up one of the pamphlets and said, "Gentlemen, this is what we propose to do for you. This must and will be built for thirty-five dollars an acre, or three million dollars. That has been set aside for that purpose." It fact, it was all the money it could possibly cost us. Mr. Newell stated that he represented the Secretary of the Interior, and that they would build the project in two years, and that the maintenance cost would be probably fifty cents an acre, but not to exceed one dollar. I think perhaps that on some of those statements he made I raised the question in private conversation with Mr. J. G. White as to the possibility of the Government stringing out the work for a great number of years on account of there being such a lot of red tape. In fact, I was

(Testimony of William H. Lyon.)

inclined to favor the Colorado Delta Canal Company, but I did not continue to favor its contracts. After listening to the speeches and reading the pamphlet and talking with the farmers I made up my mind they would put in the project, at least enough of the farmers would sign for the project that there would be no Colorado Delta project. I signed the contract. That induced me to pledge my land. If it had been more than thirty-five dollars an acre, as explained to me, I don't think [243] I would have liened my land, and if I could have foreseen that it might cost seventy-five dollars instead of thirty-five or forty dollars, and taken some thirteen or fourteen or fifteen years to build instead of two years, I thon would absolutely have not signed up.

Mr. Newell, in his statement, did not exactly explain what he referred to when he said that certain acreage would have to be eliminated; he said some waste land, some sand hills, and he might have referred to the Tule Laguna—and the Big Ben country. I am well acquainted with the entire project. There is a portion of it sand hills which are distributed around pretty evenly; they are in small spots around, and sand hills down in the center of the valley in two different places, but it didn't cover a great amount of ground—a few hundred acres and some more along the edge of the mesa. We might express it by saying the project is spotted up pretty well with small sand hills, and I presume that is what Mr. Newell referred to.

(Testimony of William H. Lyon.)

Mr. Lippincott made a speech more on the time it would take. He said that the dam was a narrow piece of work. He could only work a certain amount of men, and therefore it would take at least eighteen months or two years to build the dam, but it was only a matter of hiring more men and more teams, and they would have all those completed and the water turned on the valley in two years. I relied on the statements in the pamphlet and the speeches of those two gentlemen. After the meeting of May 28, 1904, to my knowledge they used the pamphlet, Plaintiffs' Exhibit 15, to convince prospective buyers that thirty-five dollars an acre would be the cost of the project, and it was used to get signers by Mr. Marvin and several other people, and at that time I used it myself with people who came there to buy land. I had about the best equipped ranch around there and I was milking a hundred head of cows, and a great many people came there to see the place, and I had some of the pamphlets—I believe Mr. John Donovan, Mr. Blaine, and Oscar and Archie Griffin were there, all [244] of whom are now land owners in the project; and it was used for that purpose up to 1913—I think 1914, perhaps.

Cross-examination by Mr. MORTON.

The WITNESS.—I now live at Riverside, California. I do not now own any property under the project. I sold my old homestead in 1914, I believe, and my business is now raising walnuts and cattle.

(Testimony of William H. Lyon.)

Q. Are you prepared to swear that Mr. Newell told you or any others that he represented the Secretary of the Interior, personally as distinguished from being simply a member of the Department of the Interior or Reclamation Service?

A. He said, "We are representatives of the Interior Department."

Q. Yes. Then you are mistaken when you state that Mr. Newell said that he represented the Secretary of the Interior.

A. I don't know as I said it exactly in that manner.

Q. I so understood it. I may have misunderstood you. Now you have testified that Mr. Newell when he referred to the probable elimination of certain areas of land and that therefore there was to be a margin, an extra margin of costs, you have stated that he referred to certain sand hills; did he refer to those sand hills?

A. As waste land, yes.

Q. You mean that he mentioned those sand hills?

A. He mentioned some sand hills as a possibility of eliminating some areas as waste land. I am quite sure he referred to some of the land along the levee.

Q. As a matter of fact, he didn't refer only to sand hills, did he?

A. I think he—I am very positive he mentioned the sand hills as waste land.

Q. But it was land, as you understood it, that

(Testimony of William H. Lyon.)

might be developed afterward as not irrigable area —not then irrigable?

A. I understood it was some sand hills down there. It might be irrigable if they were leveled off.

Q. Well, weren't those already eliminated?

A. I don't know, some of them have been farmed since.

Q. Yes, instead of being eliminated they were added?

A. I don't know; I don't think so.

Q. Then in this estimate that you have referred to they merely placed a blanket estimate over the valley without referring to the irrigable area at all?

A. No, they surveyed, I guess, a number of acres in the valley.

Q. But your understanding was, it included practically everything in the valley, wasn't it?

A. Yes, practically everything in the valley.

(Witness excused.) [245]

**Testimony of William B. Cloyd, for Plaintiffs.**

WILLIAM B. CLOYD, called as a witness on behalf of plaintiffs, first duly sworn, examined by Mr. Molloy, testified as follows:

My name is William B. Cloyd. I reside at Yuma, Arizona, and have resided there twenty-one years. I am the owner of a tract of land there which I squatted upon in May, 1898, and I have practically owned that land since, and I owned it in 1904. I was an entryman under the homestead law. That

(Testimony of William B. Cloyd.)

tract of land contains 160 acres. I have disposed of some of it until now I have seventy-seven acres, to be exact. Both the Colorado Delta Canal Company and the Government of the United States represented through its geological survey began operations before the spring of 1904; at least in the spring of 1903, possibly earlier. The Delta people made surveys. I may have seen Plaintiffs' Exhibit 15, but I cannot identify it. I know there were pamphlets and documents distributed and [246] circulated, but to say positively what they were or their contents, I cannot. I was present at the meeting testified to by several witnesses in my presence held on the night of May 28, 1904. Judge Kibby, Mr. Smythe, Mr. Bien, Mr. Newell and Mr. Lippincott spoke at that meeting. I mean Mr. Newell and Mr. Lippincott, the engineers of the geological survey. At this long date it is hard to distinguish between what one said and the other said. There were a few things said that I remember distinctly, but as to the general purpose for which the meeting was called I cannot state positively. As to Mr. Newell and Mr. Lippincott it would be impossible for me to distinguish except as to a few things that I remember that each said. I cannot give them as to words, but the general drift of their talk was on the feasible surveys and cost of the project. They referred to the Consulting Board, what they had been doing, and to the time spent in making surveys and to the cost. They stated that the cost of the project would not

(Testimony of William B. Cloyd.)

exceed thirty-five dollars an acre—that that was a very liberal estimate and it would not in any event—these were the exact words used by either or both of them—"in any event, it would not cost more than forty dollars an acre." My memory is that one of them stated that the time in which the project could be and would be completed was three years, but it has been stated by others differently, but three years is the time in my mind, a short time any way. They expected at that time, and the object of that meeting was to try to get the signers for the subscription, for the stock, so far advanced that work could be commenced on the dam immediately after the annual overflow, the annual summer overflow of the Colorado River. I remember that Mr. Newell distinctly referred to the Mesa as a part of the project. There was a strong effort to include it. Mr. Newell said: "This is a sacred fund and we have to protect it and use it for the benefit of the people to the best advantage." Those are his exact words, or very near it. The effect that all this had on me as to my signing up to secure the cost of the proposed Yuma project [247] would need to be explained briefly by a reference to the conditions there. We had three water companies that were in actual operation besides the Delta Canal Company, so-called, and the Government that was seeking entrance there, and the feeling was very strong. It had been strong, it had gone almost to the point of murder, and there was a portion of us that were trying to get the com-

(Testimony of William B. Cloyd.)

munity together so that there would be but one project. We realized the benefit of that and we thought the Government was fair and the most likely one to be able to get them together. I know that in the various discussions that were held some went so far as to say if the Government came in there their grandchildren would never see the project completed, and it looks like that prediction would be borne out. Others advocated that the others might not do any better. I was one of those advocating that under proper conditions the Government would be the most likely one to bring the people together. These discussions were prior to the meeting of May 28, 1904. The proper conditions were presented to me by Mr. Newell and Mr. Lippincott during that meeting, and I was induced by their representations to lien my lands. If I could have foreseen that the project would cost probably seventy-five dollars an acre, and would not be finished for thirteen or fourteen years, and possibly my grandchildren might not have seen it built I would not have placed a lien on my land. I know positively that the contracts would not have been signed at that time. I am speaking for myself and others there.

Cross-examination.

(By Mr. MORTON.)

I own land now in the Yuma Valley. I remember that Mr. Newell said "It is a sacred fund we have to administer," but I do not recall that he coupled that statement with another that it must

(Testimony of William B. Cloyd.)

be held intact. He gave me the impression in his talk that the fund was to be preserved and be a revolving fund so that it would operate over the western country for years. [248]

**Testimony of John A. Donovan, for Plaintiff.**

JOHN A. DONOVAN, called as a witness on behalf of plaintiffs, being first duly sworn, examined by Mr. Molloy, testified as follows:

My name is John A. Donovan. I am one of the plaintiffs in this case, and I reside in Yuma Valley, Yuma County, Arizona. I am the owner of a tract of land in the Lower Yuma Valley described in the complaint, and I am also the owner of another tract of land in the south Gila valley, part of the southeast quarter of section 29, township 8 south, range 22 west. I came to Yuma Valley in the fall of 1905. When I came to the valley I saw these pamphlets which have been offered in evidence in this case as Plaintiffs' Exhibit 15, which I read at that time. I think that I read it a while before I purchased land. When I came there was work progressing on the Yuma project by the Reclamation service. There was a contract to build the dam, and I believe a contract for some levee work; they were working. The name of the contractor on the dam was J. G. White & Company. I ascertained that the work going on was the Reclamation project. I made an estimate as to what the cost would be. I inquired from the Water Users' Association and from different

(Testimony of John A. Donovan.)

people there in town. I got the pamphlet at the Water Users' Association. I came to the conclusion from the pamphlet and what was told me that the cost of the project would be thirty-five dollars an acre, or about that, and as the result I bought land. I then went down on the ranch and stayed there about two years and the water gave out. We were getting some water from the Ludy system, and I think we irrigated two summers from the Ludy canal. In addition to buying land for myself I endeavored to sell land to other persons. I lived on the land about two years and then I moved to town and went into the real estate business. I sent out literature and wrote to different people I knew in California and got a great many of them to come down there. I got the pamphlets at the Water Users' Association for use, and saw that each one got one of them that came down there. Some of the persons I speak [249] of actually purchased land; among others, H. E. Abbott, T. M. Harris, A. R. Tuttle, Arthur Hebbron, G. T. Blaine, Nixon Brothers, Vierra Brothers, Mike Silva, Roland Vierra, George E. Van Gorden, —— Tonsino and Verne Lent. I cannot recall any more. I sold to several. A good many of those were former friends of mine up in Monterey County, California. I handed the pamphlet to each one of them, and I represented to them that the cost of the project would be thirty dollars or thirty-five dollars an acre. Since I came in 1905 I have resided in Yuma County, Arizona, ever since, and I

(Testimony of John A. Donovan.)

am a resident there, and was a resident when this suit was brought. If the water had been shut off from my lands in the summer of 1917, when this suit was instituted, I would have been damaged in a way that I would not have raised any crops on my lands, and the loss for that year would have been probably five or six thousand dollars; greater than three thousand. I purchased the Gila land in 1908 or 1909 from Conception Armenta, who is now dead. In making that purchase I assumed that that portion of the project would be completed, and I based that assumption on the original plan being to bring the water down from the Laguna dam, and it would come right by this Gila place or pretty close to it. I got that information from the plats and general talk in the community. A map and the pamphlet Plaintiffs' Exhibit 15 had influence upon me. If I had believed that the project would have cost more than thirty-five dollars an acre I don't think I would have purchased the land.

Cross-examination.

(By Mr. MORTON.)

The map just referred to is not a soil map. I referred to the soil maps we have got down there. We had a good many of them. When I was writing to those friends of mine I was living in the town of Yuma and was in the real estate business, and I made use of those pamphlets, and stated to those friends that the cost would be thirty dollars or thirty-five dollars. I got that from the general

(Testimony of John A. Donovan.)

impression it would be about thirty-five dollars [250] or may be a little less. I got the impression from that pamphlet and in conversation with people in general around there at that time. In 1917 I was farming a piece of land in the Yuma Valley and was renting water from the Government. I had a rental contract. I don't believe anyone had threatened to turn off my water. I don't know but what they expected to. In putting in this complaint we thought they might force us out. I don't remember what the notice stated. I didn't know that I was in any danger of having that water turned off. I asked that the project be enjoined from turning it off to prevent it from being turned off. We were afraid that they would turn it off because we would not sign up our land at that time at seventy-five dollars. I don't know as I was following somebody else's suggestion rather than looking at the public notice. I didn't look at the public notice and see that it didn't cease until the end of the year. I think that the plea for an injunction that I made and the attempt to show a grave and dangerous situation whereby I was in risk of losing five or six thousand dollars was well taken. I estimated that five or six thousand dollars by my having a dairy there and probably four hundred or five hundred hogs at that time, worth about seven or eight dollars a head. If the water was turned off they would certainly be killed, but not a total loss. I made that year five or six thousand dollars. I had about three hundred and

(Testimony of John A. Donovan.)

twenty acres of land that was clear, all in cultivation. We were dairying part of it and had some alfalfa and some grain.

**Testimony of Andrew Y. Greer, for Plaintiffs.**

ANDREW Y. GREER, called as a witness on behalf of plaintiffs, being first duly sworn, examined by Mr. Molloy, testified as follows:

My name is Andrew Y. Greer. I am president of the plaintiff corporation. I reside in Yuma Valley, Yuma, Arizona, and have resided there more than twenty years. I am the owner of a tract of land there, part of the southeast quarter of section 2, township 9, south, range 24 west, and part of forty acres in section 1, township 9 south, range 24 west. Those *lands* [251] *corner.* In 1904 I owned all of the southeast quarter of section 2, township 9 south, range 24 west, within the Yuma project. I have heard testified to here in my presence by several witnesses about a meeting held in Yuma, Arizona, on May 28, 1904, in which Judge Kibby, Mr. Newell, Mr. Lippincott and other persons spoke. I was present at that meeting. I have seen the pamphlet, Plaintiffs' Exhibit 15, now handed me, or such a one. I first saw it on the evening of that meeting or during the day of that meeting. I cannot say from whom I got it. I read most of it at that time, but not all of it during that afternoon or evening. I can only remember that at that meeting Mr. Newell bore out the statement that I had heard reported. A near

(Testimony of Andrew Y. Greer.)

neighbor of mine was a member of this—the Water Users' Association, and from him I was being posted as to what was going on at that time, and I heard from him and others just about the contents of this printed document, and about the time of this meeting, I should say during that day or evening, I received that copy and examined it—a copy of that document, or a document like this, or such as this.

Mr. MORTON.—I move the answer be stricken out as not responsive.

The COURT.—He means a document similar to that, if not that one. Well, state if you can what he said.

WITNESS.—I remember quite distinctly that Mr. Newell told us concerning the workings of the law that was enacted in 1902. I believe it was known as the Reclamation law. He stated things concerning that that we were directly interested in at that time concerning the operations of the department, I believe the Interior Department. They had been on the ground and investigated what is known as the Yuma project. The engineers of the department generally, and concluded it was feasible, and he spoke of the workings of the law and concerning steps to be taken for us to operate under this law. I have always remembered that Mr. Newell told us that the cost would not exceed thirty-five dollars, and I have always remembered that the time that he mentioned as [252] to when it would be completed would be two years and a half.

(Testimony of Andrew Y. Greer.)

Mr. Lippincott spoke with regard to the survey. He had been on the ground and made the survey and he said the project was practical. He entered into details concerning the dam especially, and he dwelt on that as to the feasibility of putting in a dam in the Colorado. If I remember right he told us that a weir dam was a practicable dam and it would be safe. I do not remember Mr. Lippincott saying anything about the cost or the time of construction. On the evening of that meeting, soon after the meeting was over, I signed up, and placed a lien upon my land. I never made up my mind to sign up with the Water Users until that evening and after reading this document, the pamphlet. I absolutely relied upon the statement of those gentlemen and the written statements in the pamphlet. If I had believed that it would cost more than thirty-five dollars per acre and taken a much longer time than two and one half years to build I should not have signed up my land. I thought that was very high for water at that time—thirty-five dollars. I thought that was about the limit.

At this time court adjourned until April 30, 1918, 9:30 A. M.

Court convened at 9: 30 A. M. April 30, 1918.

Cross-examination Of Witness Andrew Greer, by Mr. MORTON:

I am president of the association at the present time, and have been president about one month. Prior to that time I was one of the trustees or governors, as we know them. I have lived down there

(Testimony of Andrew Y. Greer.)

since Mty 20, 1898 or '99, and I have been an officer of the association two or three times during that period. Some eight years ago I was governor, and last year I was one of the board of governors. I have been pretty well familar with the affairs of the association and the conditions as to the farming business and otherwise in the valley down there during that period. I have taken a great deal of notice of the transaction [253] of business of the Water Users' Association or business connected with it at certain times. I have stated that I was persuaded or induced to sign a stock subscription contract to sign up my land for the project at the meeting of May 28, 1904,that was the time I decided to become a member of the association, to sign up with the Water Users' Association. I am now a farmer down there. I own one hundred and ten acres of land. I have been raising alfalfa and cotton the last two or three years. I located my place as a homestead in 1898 or 1899. It is in the Yuma valley district, and I am under the system as now constructed. Prior to the meeting I had not made up my mind to sign up. I did decide at that time. The price was thirty-five dollars, as I understood it. I thought that was pretty high at that time.

Q. You regard—under all the conditions, do you regard seventy-five dollars as pretty high at this time?

Mr. MOLLOY.—Objected to as irrelevant, incompetent and immaterial and not proper cross-examination. We are not asking this witness anything about

(Testimony of Andrew Y. Greer.)

conditions at the present time. His testimony don't go beyond May 28, 1904, the date he signed up his land.

Mr. MORTON.—Evidently the point in this suit the plaintiff is trying to make is that they were persuaded to enter into this contract and for that reason they were wronged and injured, because now one thing with another they cannot afford to pay the actual cost of seventy-five dollars in annual installments. The thin is inseparable, if there is any merit to the grounds on which the whole case is brought.

The Court.—Sustain the objection to the question as to whether or not he considers the price of seventy-five dollars too high, for the reason that opens up a wide field which it seems to me would not be in the case and perhaps have no influence on the decision of the main points. Besides the witness has not yet qualified to answer that and he has not been asked anything of it on direct examination, and plaintiffs have not introduced any testimony tending to show that they could not pay that. In other [254] words, if the court was called upon to determine whether or not they could pay that then I think this line of cross-examination might be proper.

Mr. MORTON.—Simply for the record and formality we take exceptions.

WITNESS.—Mr. Newell at that meeting described the workings of the Reclamation law. I don't remember anything concerning his referring to the "sacred fund." I don't remember that phase of the

(Testimony of Andrew Y. Greer.)

question. It was referred to as a revolving fund planned to reclaim the desert lands of the west and to be used again and again for that purpose.

**Testimony of Oscar P. Bondesson, for Plaintiffs, (Recalled)**

OSCAR P. BONDESSON, recalled as a witness for plaintiffs, examined by Mr. Molloy, testified as follows:

I am familiar with the geographical boundaries of what may be described as the Yuma project and such portions as are described in the articles of incorporation of the plaintiff corporation as the Lower Colorado River Irrigation District. There is a distinction between the Yuma propect and the Reclamation project and the portion thereof involved in this suit. I understand the bottom lands are included in this suit, including the north and south Gila district and the Yuma valley proper. The Yuma mesa, as marked upon the plat in this case as plaintiffs' Exhibit 26, is not included in this law suit. The portion of this plat (Plaintiffs' Exhibit 26) marked in a greenish or blue color are lands that are here involved, excluding therefrom, however, a portion of the northern side of the Colorado River marked "Yuma Indian Reservation." I understand that for the purpose of the trial of this case and as set forth in the pleadings the lands involved in this case are designated upon a small plat annexed to the complaint as an exhibit, and they are divided into three tracts, a portion between in Delta between the Colo-

(Testimony of Oscar P. Bondesson.)

rado and Gila rivers being delineated thereon as Tract A, and the portion south of the Gila river and north of the northern boundary [255] of the Mesa being delineated thereon as Tract B; and the lower Yuma valley where my lands are situated is delineated thereon as Tract C. The drainage system for Tract C is not completed. A drainage canal has been opened from near the Mexican line, extending northeastward somewhat centrally through the valley for a distance of about twelve miles. At the lower terminus of this drainage canal is situated a pumping plant in which a part of the units for pumping have been installed and a part have not been installed, or were not on my last visit to the plant.

Q. How much of the drainage system in the lower Yuma valley, otherwise Tract C, remains to be completed?

The COURT.—Has the project been completed to the other tracts; is that admitted?

Mr. MOLLOY.—No, your Honor.

The COURT.—Has it been completed in A?

Mr. MOLLOY.—Not at all. It has been abandoned. There has been some work done on Tract A, but practically nothing at all on Tract B so far as physical work is concerned.

The COURT.—Your contention is that you are not required to make any payment until the project is entirely completed?

Mr. MOLLOY.—Yes.

The COURT.—You claim that is the law?

Mr. MOLLOY.—And the contract, yes.

(Testimony of Oscar P. Bondesson.)

The COURT.—And the contract?

Mr. MOLLOY.—Yes, sir.

Q. How much remains of the drainage system to be completed in the lower Yuma valley?

Mr. MORTON.—I don't believe this witness is qualified to answer. He has not testified in any manner whether he knows anything about it or not.

The COURT.—Now wouldn't it be better for you to first show what the project was at the time the contract was entered into, in which you say it provides that no payment shall be made until it is completed and then show whether that identical [256] project has been completed.

Mr. MOLLOY.—The plates and maps referred to in Plaintiffs' Exhibit 15 and the larger production thereof—Plaintiffs' Exhibit 26—we contend show it. It is a mere matter of a statement of facts.

The COURT.—Ask him whether he is familliar with the project?

WITNESS.—I am familiar with the project and the nature of the work set forth in the plat furnished me by Mr. Lippincott on May 28, 1904. The drainage system as set forth on that plat has not been completed. A considerable portion of the main drain and whatever laterals are necessary to properly drain the valley remain uncompleted. One-third of the main canal is incomplete, and no laterals whatever had been constructed. I am familiar, from the plans furnished me by the officers of the government, in 1904, with the nature and extent of the land contained in the north and south Gila lands referred to

(Testimony of Oscar P. Bondesson.)

in the complaint as Tracts A and B. In Tract A that portion of the Gila valley north of the Gila river there has been considerable levee work done on the Colorado river. Very little on the Gila, and main canals and some laterals for irrigation, but the tract as a whole is not susceptible of irrigation. Tracts A and B have not been completed. I said that Tract A, as a whole, is not susceptible of irrigation. The levee along the Colorado River in Tract A was finished only a part of the way down, protecting the upper part of that tract and not the lower or southern part. I should say that the levee was finished a distance of approximately half way from the dam to the Gila River, a distance of six or seven miles; and the levee on the south side of Tract A and the northside of the Gila River has never been completed. Some work was done upon the easterly side of Tract A, five or six miles down the stream on the Gila river, but was never protected and a great deal of it washed away. Some laterals in Tract A were not completed or constructed. The tract as a whole is not covered by [257] laterals, for which reason I now say a large portion of Tract A is not susceptible to irrigation, but it is naturally susceptible to irrigation. In Tract B there was an attempt made to levee the Gila River along its south side, early in the status of the project. The levee was built for a distance of five or six miles, was not protected, and has since been abandoned. The projected siphon or some sort of aqueduct over or under the Gila River as set forth on those plats has never been constructed.

(Testimony of Oscar P. Bondesson.)

The COURT.—How much of Tract B has been put in cultivation.

WITNESS.—Absolutely none.

The COURT.—None of Tract B has been irrigated or reclaimed.

The WITNESS.—No, sir.

WITNESS RESUMES.—There has been no construction whatever of canals in Tract B, and no drainage whatsoever, and no levee on the south side of the Gila, except as I have stated, or on the south side of the Colorado River.

The COURT.—Did I understand you to say that Tract B was on the maps originally submitted as part of the project?

A. Yes, sir.

The COURT.—How many acres embraced within that tract?

A. My recollection is about six or seven thousand acres.

WITNESS.—No pumping plants have been constructed on Tract B, as originally shown on the plats furnished.

Cross-examination.

By Mr. MORTON.—When I refer to the "lower Colorado district" I don't mean a district organized under the state laws. It is some nomenclature that was used in the earlier maps and tracts and things of that kind. I am familiar with the contract between the association and the Secretary of the Interior. It seems to me that the contract did in some of the phases of the contract after the preamble use

(Testimony of Oscar P. Bondesson.)

the term "Lower Colorado Irrigation District." This [258] Lower Colorado Irrigation District includes three bodies of land, two smaller areas on either side of the Gila River, and a larger area in the valley proper, which has recently been covered by a notice of April 6, 1917, by the Secretary of the Interior. I do not postively know how many acres there are in Tract A between the Colorado River and the Gila River. I know that the acreage has been very considerably decreased on account of the changes in those great streams, and that those streams at certain seasons of the year are practically uncontrollable without a proper levee system. I am familiar with the flood of 1916. The flood of 1916 in the Gila River was the greatest flood on that river during the past twenty-one years. The Gila is peculiar in that its floods are more sudden, higher and more violent than the Colorado; in a sense the Gila is a stream of all streams that is hard to anticipate anything about. The area of Tract B is practically all there, the channel cutting on one side. I would say if the land had been properly protected by levee systems there could have been the same irrigable areas in Tracts A and B as there was in the earlier days. I now wish to state that in a sense there is the same acreage. You cannot destroy the acreage. It is there. It is either in the stream or out of the stream. I know that the government has expended funds up there in an attempt to reclaim that land. I do not know how much. I do not pretend to definitely know how much. It is my idea that the dotted line that is through the center

(Testimony of Oscar P. Bondesson.)

indicated on this map, Plaintiffs' Exhibit 26, is the drain that was contracted to be built, that the plaintiff claims was contracted to be built; that is very near that location, not absolutely every kink in it. I was aware that the map was of a preliminary character, and that it couldn't pretend to represent the actual location of these works. I was told that. Instead of fourteen miles as shown on this map there were about fourteen miles in a rough outline, about that. I will say that there were approximately eighteen miles shown so far as I can estimate on the map, and I include [259] in that two lagunas that were to become part of the system.

Q. If it was afterwards decided as a matter of engineering that the construction of say twelve or thirteen miles of drain was sufficient for the purpose indicated on the map, you don't think that that would be inconsistent, do you, with the idea.

Mr. MOLLOY.—It is objected to what he thinks. The witness has testified to a certain line of physical facts and it is not proper cross-examination.

The COURT.—I sustain the objection.

Mr. MORTON.—Exception.

WITNESS.—There have been approximately twelve miles of drains constructed down there altogether. I am a farmer. I am familiar with the needs for drainage for the lands, and am able to estimate that fairly adequately. In a sense it is my idea that after testifying that I could make a fairly adequate estimate of drainage that the need for drainage developes as the progress in irrigation de-

(Testimony of Oscar P. Bondesson.)

velops. In this case we were reasonably sure we would need drainage in the valley. In some localities it is utterly impossible to tell where you want to put those branch drains or laterals until the land has been irrigated a number of years, but in this locality it was absolutely necessary. As to the main canal there couldn't have been much doubt where it would be. It is being dug now. My place is within half a mile of that canal.

The COURT.—Describe generally what you think has been done to complete the project.

A. With reference to the drainage of Tract C, as I stated, perhaps two-thirds of the portion of the main canal has been dug. The pumping plant installed for the pumping of the waters over the levee into the river has some of the units installed, others are to be installed. The portions remaining uncompleted of the drainage system are the balance of the main drainage canal and such laterals as will properly drain the valley—the ground water from rising so as to interfere with the [260] growing of the crops. As a matter of fact, the ground waters are rising now. The drainage is rather behind in keeping up with that rise of the ground waters. The lands are now water-logged in certain sections of the valley. It seems to me that two or three years ago the Water Users' Association itself asked that the construction of the drainage system be postponed. There was something of that kind attempted to be put over by the officers of the Association. That is to say, they wished it to be postponed for a short

(Testimony of Oscar P. Bondesson.)

time until they could see what was necessary. I am not familiar with that personally. I was not present at the meeting and have never examined the minutes to see whether a resolution was actually passed by the board of governors to that effect. I know Mr. De Vane, the secretary. I know his signature. I know the seal of the association. I would be able to identify the paper that is handed me.

Mr. MORTON.—What does it purport to be?

Mr. MOLLOY.—We object to all this as not proper cross-examination, what somebody else has written.

The COURT.—Do I understand that the reason it was not completed was that the association asked that the work be deferred?

Mr. MORTON.—It is introduced as one of the points that might be made on estoppel, if it should be at all considered.

The COURT.—Objection sustained.

Mr. MORTON.—Exception.

WITNESS.—I am familiar with the facts that there was a determination many years ago—I have forgotten the exact date—to have a change made in the construction of the main canal for the Yuma project. I know that the original canal as planned was to cross the Gila river in a siphon. I do not know that that was abandoned because of the excessive difficulty of building that siphon. I know, however, that there was a change made so that the main canal instead of coming down on the Arizona side through

(Testimony of Oscar P. Bondesson.)

the north and south Gila valleys was built on the California side and then was carried across the Colorado River by a siphon [261] at Yuma. That was one of the changes that was made from the so-called preliminary plans or estimates referred to here.

Redirect Examination.

By Mr. MOLLOY.

In the Yuma valley paper, described as Tract C, with the exception of a few of the larger constructions, practically all of the headgates and works of that character mentioned in the phamphlet plaintiffs' Exhibit 15 are built of wood instead of cement as originally planned and proposed to be constructed by the Reclamation Service. I have stated that some of the lands to which the drainage canal or laterals have not been extended is waterlogged. I cannot testify as to the acreage. I know the locations. That is by reason of the rising of the water level due to the fact that the water that is used for irrigation on the lands does not flow readily off and back into the river rapidly enough but what the ground water is rising, or approaching the surface, bringing up salt and alkali and thereby rendering the lands unfit for cultivation. There are also some areas to the west of the Tule Laguna and northwest, into the section where the main canal has not been extended (indicating on plat), to the west of this section here, this place indicated as Ingall's Laguna and northwest of the Tule Laguna and on up towards the bend in the Colorado river. I might also state in the east part of the val-

(Testimony of Oscar P. Bondesson.)

ley in the section immediately surrounding what is known as the Sunnyside school house the lands are now so waterlogged that they cannot be prepared for cultivation. Teams are bogged as they enter the lands to plow. The original plan was to construct at the time of the construction of the irrigation canal, or soon thereafter, a drainage system to prevent these things from occurring. The main drainage canal has been extended and constructed to a point draining what is known as the Ingall's Laguna, about centrally located as regards the north and south of the Yuma valley. [262]

Recross-examination.

By Mr. MORTON.

I know that work is now being done on that very drainage system. On my last visit there only one dredger was at that place. They were making progress. In speaking of wooden head-gates on the canal I was referring to part of those main canals and so-called branches of those canals and laterals. I was not entirely referring to laterals. I know that there are not concrete headgates on the main canal as an entirety. The main structures are concrete on the main canals, but I would not say that wooden structures are generally upon canals that don't come within the class of main canals. If I understand correctly the meaning of "main canals" I would say that the most of the bridges are wooden. The concrete structures are on the main laterals of the system. They are adequate for the present, but very temporary in character. They

(Testimony of Oscar P. Bondesson.)

are not lasting; they will have to be replaced in a certain number of years. I would draw the line between the main canals and laterals by saying a lateral was a branch carrying say two irrigation heads, consisting of about twelve second feet each. The other main canals would be laterals and main canals. I don't recall now just how many miles of canals are built. I would say that somewheres near three hundred is the amount, counting the main canals anl laterals. I would say from looking at the preliminary map that there is something over one hundred miles of main canals indicated on the three portions referred to as Tracts A, B & C.

Redirect Examination.

By Mr. MOLLOY.

The extent of the delineation of the preliminary map are main canals and a few laterals. If the lands to be irrigated there would have to be smaller laterals. In that connection Chief Engineer Newell stated that the water would be delivered to each tract of land, for the land signed up, to the highest point, and that everything would be of a permanent nature so as not to be replaced, but wooden headgates were used in the construction.

Recross-examination.

The WITNESS.—I mean water would be delivered to each one of the 160 acre tracts so that each person would have a delivery of water to his particular piece of land to the highest point. I have stated that I depended on this pamphlet for repre-

(Testimony of Oscar P. Bondesson.)

sentations made also. The pamphlet states at the bottom of page 4 "a distribution system has been estimated upon to furnish water to each 160-acre tract." I think perhaps that was really the understanding in the sense [263] that if we signed up 160 acres that would be the size of the unit at that time.

Mr. MOLLOY.—May it please the Court, at this time we have no further evidence to offer, and in pursuance with the quasi arrangements, at this time we offer to prove certain matters.

Mr. MOLLOY.—"The plaintiffs offer to prove, and hereby avows their readiness and ability to prove by the testimony of numerous witnesses to the number of at least twenty, in addition to the testimonies of plaintiff's witnesses hereto examined, that plaintiff's Exhibit 15 for identification, the certain pamphlet testified to by the plaintiff's witnesses heretofore examined, was generally circulated amongst all of the land owners within the Lower Colorado Irrigation District on May 28th, 1904 and continuously thereafter until ninety-eight per centum of all the land within the Lower Colorado Irrigation District had executed subscriptions for the capital stock of the plaintiff corporation by executing acknowledging and delivering, each of them, an instrument similar in tenor and effect to the sample form thereof offered in evidence as plaintiffs' Exhibit 14; and that at the mass meeting held in the town of Yuma, Arizona, on the night of May 28th, 1904, testified to by plaintiffs' witnesses here-

tofore examined, F. H. Newell, Chief Engineer of the U. S. Geological Survey and J. B. Lippincott, Supervising Engineer of U. S. Geological Survey, and each of them, stated and represented to the land owners assembled at said mass meeting, that they, the said Newell and the said Lippincott, and each of them, represented and there spoke for and on behalf of the Secretary of the Interior of the United States of America, and that the written statements and representations set forth in said Exhibit 15 and the plat and drawings annexed thereto, were true and correct and could be relied upon, and that the Yuma project as therein described and thereon delineated could be and would be constructed, as a whole, within two years from the actual commencement of work thereon, at a cost of not to exceed $35 per acre, and possibly less, and that they, and each of them, the said Newell and the said Lippincott, would pledge, and did then and there pledge, their professional reputations as engineers, such as it was, that said project could be and would be so constructed within said time, and at said cost; and that each and all of said proffered witnesses, and each and all of the land owners present at said mass meeting believed in and relied upon the statements so made by these said engineers, and relied upon the statements, representations and delineations contained in said pamphlet and the said land owners, and the said proffered witnesses, and each of them, were thereby induced to, and did, execute, acknowlege and deliver to Yuma County

Water Users' Association, the plaintiff corporation, their subscriptions for stock identical with Plaintiffs' Exhibit 14, thereby placing a lien upon their land to secure the payment of the estimated cost of said project; and that if said witnesses, or said land owners, or either of them, had known or could have foreseen that the cost of said project would have exceeded the sum of $35.00 per acre, or, at the extreme outside, the sum of $40.00 per acre, and that said project would not be completed within two years from the time of commencement of work thereon, that they would not, nor would either of them, have executed or delivered said stock subscription agreements."

Mr. MOLLOY.—That is our first offer.

Mr. MOLLOY.—"The plaintiffs offer to prove, and hereby avow their readiness and ability to prove by the testimonies of numerous witnesses, not less than twenty-five, that the charge of $75.00 per acre provided for in the so-called public notice of April 6, 1917, concerning said Yuma project, an unjust and inequitable burden upon the lands within said Yuma project, and the owners thereof, and that said owners cannot afford to pay such charge, the same being more than said lands will bear, one year with another, taken over the period of time provided for the payment of the annual installments of the construction charge of said project, and that the same is, and will be, excessive, unjust and grossly exorbitant, and out of all proportion to, and [264] *and* greatly in excess of

the actual value of the works constructed, or to be constructed, in said Yuma project, for the irrigation and reclamation of said land; and that the charge of the sum of $1.50 per acre per annum, for each acre of the land within Tract C, as described in the complaint, as a minimum operation and maintenance charge is, and will be inequitable, unjust, illegal, arbitrary, excessive and unreasonable, and greatly in excess of the reasonable cost of the operation and maintenance of said project."

Mr. MOLLOY.—We have another matter which bears upon the amendment. It is a side issue and deals with only a certain class of the plaintiffs and a small percentage of land.

Mr. MOLLOY.—"Plaintiffs offer to prove that there is within the limits of said Lower Colorado Irrigation District, as described in the complaint, some six thousand acres of land which was, on May 10, 1904, in private ownership, although within the exterior limits of certain withdrawals under the second form of withdrawal, according to the provisions of Reclamation Act of June 17, 1902, and of which said lands were thereafter, and prior to the commencement of this suit, relinquished to the United States and re-entered by homestead claimants under said Act, in tracts of 160 acres, and of other areas greater than 40 acres, for which the Register and Receiver of the Phoenix, Arizona, Land Office received and accepted the fees required by law for the entry as homesteads of said respective tracts so re-entered, and that said new entrymen have been per-

mitted by the Secretary of the Interior to hold all of the areas so re-entered as homesteads without diminution or confirmation to a farm unit for a great number of years in each of said respective cases, to wit: The period of ten years, including John W. Hevener and his homestead entry for the northwest quarter of Section 17, Township 10 south, Range 24 west, G. & S. R. Meridian, in Yuma County, Arizona, and many others similarly situated to said Hevener."

Mr. MOLLOY.—These are our three offers.

Judge KING.—We have no objection to the counsel making this offer and if the Court should hold any feature of this testimony as admissible as offered here and witnesses were to be put on the stand for the purpose of establishing those facts, we would object to each of the contentions and the position counsel has taken and offers made as incompetent, irrelevant and immaterial. I take it we are merely stating this now so the Court may know our position.

And thereupon the plaintiffs rested their case. [265]

AND THEREUPON to sustain the issues on their part the defendants offered and introduced the following testimony:

**Testimony of Arthur P. Davis, for Defendants.**

ARTHUR P. DAVIS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

(Testimony of Arthur P. Davis.)

My name is Arthur P. Davis. I reside in Washington, D. C. I am Director and Chief Engineer of U. S. Reclamation Service and Chief Engineer for twelve years, and Director for four and one-half years. Was first employed by Reclamation Service immediately after passage of Reclamation Act, and constantly since. I was Assistant Chief Engineer in 1904. By profession I am a Civil Engineer. I am a graduate of Columbia University.

Mr. MOLLOY.—We gladly and freely admit the qualifications of Mr. Davis as an Engineer, and that they are of the highest character.

WITNESS.—I was familiar with the Yuma project in the years 1903 and 1904. In the early days, the administration of the Yuma Project was not in my charge, but in the immediate charge of an officer called the project engineer who conducted that office under the supervision of a supervising engineer, Mr. Lippincott, and while I was assistant chief engineer, I didn't have immediate supervision, but was under the orders of the chief engineer and represented him on various occasions, but he was the man who decided and gave orders. I occasionally acted as chief engineer in his absence. I have heard most of the plaintiff's testimony. The investigation of the Yuma Valley for the purpose of discovering and selecting a feasible reclamation project began, as I remember it, in the fall or winter of 1902, and was carried forward under the supervision of Mr. Lippincott. I paid the valley a brief visit in January, 1903; I had previously visited the

(Testimony of Arthur P. Davis.)

valley for the purpose of establishing and conducting stream measurements before the passage of the Reclamation Act. The investigation progressed during the year 1903. Early in April, 1904, I was a member of the Board of Engineers who were designated by the chief engineer to examine the plats that had been made for an irrigation project in the valley and make reports and recommendations thereof. The meeting of this Board has been referred to in the evidence and the names are in evidence and I think the report is in evidence. I joined in the examination for two or three days that was spent in inspecting the valley and discussing the various plans, and joined in the report that was made at that time and my signature was attached to it. Some time during the sessions of that board a request was made or suggestion made that we have a conference with the officers of the Water Users' Association and such a conference was held between the Board of Engineers and the Directors of the Water Users' Association. The spokesman on behalf of the Association, as I now recall, was Mr. Winsor, President of the Association. I was spokesman on behalf of the Board of Engineers and we described to them in a general way the scope of the investigations and the conclusions so far as reached, and in answer to their queries expressed an opinion as to what such a system of irrigation as I had described to them might cost, and the figure that I mentioned as to the probable cost of such a system was about forty

(Testimony of Arthur P. Davis.)

dollars per acre. I introduced my discussion with them by the description, briefly, of the provisions of the Reclamation Act, showing that it was a fund for the use of public land; that the law provided that it was to be a revolving fund and that all the money expended under the provision of the Act would be returned. And that seemed to be no surprise to anyone. No one challenged that statement or conclusion. The report speaks for itself as to the conclusions, but one of them saw a doubt of the feasibility and finality of the plans for crossing the Gila River and the board or some member of it suggested further investigations on that point and further investigations were subsequently made. Investigations were [266] subsequently made also to work out more fully the various other features of the project and investigations continued for some length of time I think without material cessation until the work was actually taken up. One of the activities of that period was the preparation of more detailed plans for the various features of the project and specifications for the Laguna Dam. In May—the 28th of May, 1904, I attended a meeting in the City of Yuma called for the purpose of discussing this matter and bringing forward the various features of it. That meeting was addressed by Mr. Newell, Mr. Lippincott, Mr. Smythe and others whom I do not so clearly recall, but those I recall very clearly. And the description of the project, provisions of the Reclamation Act and the plans of the Government were set forth in that meeting

(Testimony of Arthur P. Davis.)

substantially the same as I had set them forth for the Board when meeting with the Board of Directors during that year and the previous year. I am not now able to recall the exact words that either of us used on those occasions except to a limited extent. I can say, however, that that address so far as I was concerned and I think so far as Mr. Newell was concerned, were similar to what we were in the habit of delivering elsewhere. I am now describing the address and conversation that I did deliver, and the addresses delivered by Mr. Newell. I don't recall delivering any address on the 28th of May to anyone. The Service was represented by the Chief Engineer and I believe by the legal representative, Mr. Bien, although I was present at the meeting and remember portions of the addresses and remember the meeting being a crowded meeting, I don't recall that I spoke; if I did, I did very briefly, but according to my best recollection I didn't speak at that meeting and in describing what I did say, it was a description of previous conversations with the directors. What I was going to say was that the general trend of the addresses that I gave and Mr. Newell gave was that the law required the careful investigation and determination of projects with a view to keeping the reclamation fund intact as a revolving fund so as to be duplicated, but be returned in full without interest and without profits, but as nearly full as possible so that the money could be used in the future, and one reason I state that so positively

(Testimony of Arthur P. Davis.)

there cannot be any doubt about it, it was necessary to make that explanation that the Reclamation Service had a future, the amount was small, the problem before it was extremely vast, and unless it were made a revolving fund the intent of the law would not be a success, and it was a very important feature to set forth. The purpose of that was also to impress upon the people whose project we were considering that they would be expected to pay back the investment which the Government might make for their benefit. I remember that the estimate the Board of Engineers made was more than thirty-five dollars per acre, and the figure that I used in talking to them was the figure of forty dollars per acre. That was impressed upon my mind because I had some doubts of the concurrence of the Board. That was on April 8th. Subsequently more detailed estimates were made for the various features of the project and changes of plans were made of various kinds. We were discussing alternative plans for the Laguna Dam from time to time and finally decided upon a type of dam in a general way such as now exists there and drew specifications for that purpose. We advertised for the construction of the dam and received a number of bids and, as I recollect, the first group of bids were rejected because of an irregularity due to the mails. Some of the bids were late. At any rate, bids were finally considered, a considerable number of them—I think there were eight perhaps, more or less, and most of those bids were for a

(Testimony of Arthur P. Davis.)

lower total than the corresponding work was estimated by the engineers. The contract was let to J. G. White & Company, a well-known engineering and construction company of the City of New York who had carried out large works, and being then large contractors in the Philippine Islands for the Government of the United States. The contractors began work some time, I believe, in July, 1905, and carried that work forward with varying fortune until they found they were losing money. The conditions were more difficult than expected. The returns [267] were not commensurate with the outlays and the president of the company visited the city of Washington and laid certain claims before the chief engineer, claiming that conditions were different from those expected and contemplated in the specifications and there should be a modification of the contract. The chief engineer appointed a board of engineers to look into that matter and I was a member of the board. We visited the site of the Laguna Dam in August, 1906, I think was the date, and spent some time examining conditions and receiving the pleas and representations of the contractor's engineers. We held two or three days' session with them and found that conditions were materially different from those expected, particularly as to rock in abuttment of dam, and available for construction purposes in neighborhood—difference from specifications also radical here.

Mr. MORTON.—Mr. Davis, it has been stated that there was an understanding with these people

(Testimony of Arthur P. Davis.)

in those early days that the project would not cost more than thirty-five dollars per acre. You have testified, as I understand it, that that understanding on the contrary was that the engineers, according to their estimates then, deemed it would cost thirty-five dollars to forty dollars per acre, your own figure being forty dollars, but that in any event the fund would have to remain intact and actual cost would control. Now describe in as brief a form as you can and as clearly as you can and in as general form as you can the reasons for the increase of cost and events leading up to it.

Mr. MOLLOY.—Objected to as incompetent, irrelevant and immaterial. It is immatrial what the actual cost may have eventually come to. The Government of the United States and the Secretary of the Interior was bound by his estimated cost as declared and determined by him in May, 1904.

The COURT.—The testimony will be received and the Court will rule on it later.

A. Briefly, the reasons for the additional cost were three: The first is the unexpected conditions that developed as to poor rock and some other physical conditions; the difficulty in dealing with the rivers which were then not so well-known as now, and other minor physical difficulties. Second, the change in industrial conditions which was very important. There was a very rapid increase in the price of labor, price of material, and especially in the scarcity of efficient labor. That was one of the chief difficulties the contractor had which led al-

(Testimony of Arthur P. Davis.)

most to his ruin and calamity in October, 1907, when there was an industrial collapse. It had been greatly hastened by the destruction of San Francisco, which in its building in 1906 and 1907 absorbed building materials and labor which affected greatly the western part of the country. The conditions were generally changed, the plans were changed in order to make a better project and more endurable project, one of the features being substitution of the siphon under the Colorado River for one under the Gila, which was decided upon for the reason there were very grave doubts of the feasibility of maintaining such a crossing on the Gila River. The original plans provided that the main canal which was to serve the entire Arizona side of the project, including the lower Yuma Valley, should be built on the Arizona side and it involved a crossing of the Gila River and a large mileage of the canal in the valley of the Gila River where it might be attacked by that stream when in flood, and if reached would deprive the entire lower valley and a portion of the upper valley of any water for irrigation and in a high, arid climate of this kind that was a very serious jeopardy. Largely to avoid that jeopardy the crossing plans were changed and the main canal was finally built on the California side and the portion to water the lower Yuma Valley was brought through a siphon under the Colorado River just below the city of Yuma. Another change was that a very much larger mileage of canals was built than was shown on the plat

(Testimony of Arthur P. Davis.)

which has been placed in evidence here; approximately, I think four times the mileage, although the increased mileage was of small conveyance mainly. And it is those canals that contain a large number of small wooden structures.* That policy is one which we have developed with the experience of surveys, and observations of other works, as being the wise one. [268]

Q. Was there any change in the hours of labor, the day's labor, hours of labor?

Mr. MOLLOY.—We urge the same objection.

The COURT.—The same ruling.

A. Technically, no. The law was not changed. The original Reclamation Act contains a paragraph requiring eight hours to constitute a day's labor for common labor—labor of mechanics, but it was a practice in those days for contractors to make agreements with their men and work them ten hours and they probably made their bids on that basis. At any rate that was the practice and J. G. White & Company began that practice and carried it on for some time and were arrested by the local authorities and I understood paid a fine and had to discontinue it and work men eight hours. They had a great difficulty in securing labor which was one of the strongest items involved in the increased cost of the Laguna Dam, and another cause the increased difficulty of navigating the Colorado River The contractor began, I believe, first to do some

*(The main structures on the Yuma Project being of a permanent nature.)

(Testimony of Arthur P. Davis.)

freighting on the Arizona side and found that the Gila River interrupted his traffic frequently, or for other reasons he changed to the river for navigation, but the Colorado River broke into Imperial Valley and began cutting its channel very rapidly and the effect of that cutting reached back well into the Yuma Valley. I mean cutting the bottom lower and lower. The river in its former position reached sea level and at the Gulf of California, something over a hundred miles below Yuma, and by the change in approximately the same distance or perhaps a less distance, reached an elevation practically two hundred and fifty feet lower than sea level, so that it had a very great declivity. It cut great, deep gorges through the Imperial Valley and caused cataracts which were undermined by the high velocity causing deep gorges. The effects of that reached up, I don't know how far, but above the city of Yuma. I know that from my experience in navigating the Colorado River. Prior to that cutting the Colorado River was being navigated to the Laguna Dam and above, after the cutting I found it impossible to so navigate it. It formed a series of rapids which prevented the passing of the boats. I know for I was on a boat with a good pilot that could not pass, and we spent many hours there. That and other difficulties led to the abandonment of the navigation of the river and to the construction of a wagon road on the California side by which considerable freight was hauled to the dam. Those three methods, a road on the Arizona

(Testimony of Arthur P. Davis.)

side, navigation of the river and a road on the Colorado side, were the methods that had been used for freighting to the dam during the pendency of the work of the contractor—during the progress of the work of the contractor at the Laguna Dam. There was no railroad constructed by the contractor. When the Government took over project upon the failure of the contractors, the experience theretofore had by him demonstrated that those methods of transportation were not only enormously expensive but ineffective, and had contributed largely to his loss and at last it was decided that a railroad must be built and such a railroad was built under the auspices of the Government. That railroad is in existence and is used for occasional travel, for hauling rock from the Colorado River to the dam and maintenance of levees in the lower valley and upper valley, also for taking such material as required to the Laguna Dam.

Q. What was the effect of all this so far as cost is concerned?

Mr. MOLLOY.—Same objection, incompetent, irrelevant and immaterial.

The COURT.—It may be received subject to your objections.

A. These things greatly increased the cost of the dam under any management, irrespective of management.

(Testimony of Arthur P. Davis.)

Q. Were, or were not other portions of the project affected in the same way by increase in material, labor, etc.?

Mr. MOLLOY.—Same objection.

The COURT.—Same ruling.

A. Oh, yes, yes.

Q. Mr. Davis, there has been a reference here to surveys—preliminary surveys having been made in the very early days and the delineation at that time of a so-called Lower Colorado Irrigation District, would you describe what was the nature of those surveys [269] that were made prior to, we will say, the meeting of May 28th, 1904? What did they constitute, if you remember anything about it, and what was the significance of having this Lower Colorado Irrigation District, designated as an area there? What was its significance?

Mr. MOLLOY.—Objected to. The surveys are in writing and in any event it is already in evidence.

The COURT.—Well, he may enlighten the court as to those maps.

Q. All I want is the nature of them. Were they preliminary, or permanent, or in the permanent locations of any canals?

A. At the time of the meeting of May 28th, 1904, there were no surveys or locations of anything that anybody regarded as permanent. There were approximate locations of some features. The principal feature of that character being the Laguna Dam, but even that was subject to change, not only

(Testimony of Arthur P. Davis.)

in location but design, and was subsequently changed in design and I think in location. There was not at that time a definite determination of the irrigable area in Lower Colorado Irrigation District.

Q. What was the significance of acquiring that body of land there?

Mr. MOLLOY.—Objected to. The contract speaks for itself. It is immaterial what was the significance.

Judge KING.—It all goes to the question of why certain estimates were made.

The COURT.—I think he may answer.

Mr. MOLLOY.—Exception.

A. The significance of those plans, is your question?

Q. The significance of the lower Colorado District as an area; what was it all about?

A. It was the area in which we were endeavoring to work out, and had tentatively worked out a feasible irrigation project in which we had made an attempt to approximate the acreage that could be covered and the works that would be necessary for that and their probable cost.

Mr. MOLLOY.—We move the answer be stricken out for the reason his oral testimony cannot be held as a contradiction. We have at all times adhered to the theory that the Secretary of the Interior did make an estimate. Now, he says it was merely tentative.

The COURT.—You will remember that you in-

(Testimony of Arthur P. Davis.)

troduced testimony for the purpose of showing or tending to show that these witnesses stated what the cost would be, and staked their reputation on it, now may not this witness state what the physical facts were in order for the Court to determine whether or not their testimony and your testimony guaranteeing it would be built be determined? I think we must receive all the testimony along that line. Objection overruled.

Mr. MOLLOY.—Exception.

Q. Mr. Davis, you recall the point that was made this morning and the reading of an excerpt from the contract between the Association and the Secretary wherein we had a statement that the irrigable area shall be determined upon careful surveys and examination—that was the substance of it. That contract as it is in evidence, attached to the complaint, was dated some time in July, or May 31st, if I remember rightly, 1906. In order to determine the irrigable area and to carry out the project, have surveys and investigations since been made?

A. Yes.

Q. And has the irrigable area of that project been determined?

Mr. MOLLOY.—We object again on the same ground.

The COURT.—Overruled.

Mr. MOLLOY.—Note an exception.

A. Approximately, yes. The area of the so-called north and south Gila Valleys, also referred to in the complaint as Tracts A and B, of the Lower

(Testimony of Arthur P. Davis.)

Colorado Irrigation District, were withdrawn from entry in the early days, but have since been restored to entry. The purpose of the withdrawal was to prevent prior entry before the proper time, pending examination and the determination of the feasibility of the project and the final action even if not feasible. The purpose of the restoration was the last step in the abandonment of that part of the project as far as irrigation was concerned by this project. [270]

The COURT.—In other words, when you determined it was not practical to irrigate they were restored to entry.

WITNESS.—Not immediately. It is a custom of the Irrigation Service to not restore lands while there may be danger of people being misled into filing upon the land and we have frequently held lands beyond the time of the actual needs of the Act for that reason.

The COURT.—In any event you determined it was not feasible to include them within the project?

A. Yes, and that was the purpose of the restoration, the reason for it.

Q. Will you tell us something about the situation up there on the north and south Gila as to the practicability of those areas becoming a part of the project and the reason for their exclusion?

A. They are excluded—

Mr. MOLLOY.—We object to that.

The COURT.—He may answer the question.

Mr. MOLLOY.—Note an exception.

(Testimony of Arthur P. Davis.)

A. This map has upon it in dotted lines the course pursued at various times by the Colorado River and the Gila River. That color in yellow shows the course of the Colorado River in 1903 and the course of the Gila River along the lower line. The red line indicates the boundary and course of the Colorado River in the upper part and the Gila River in the lower part in 1917; and the various dotted lines show the various peregrinations and meanderings of the rivers in the early days. Now this shows that in 1903 the Colorado River ran along the yellow line which is far to the north of where it afterwards came and by its cutting to the southward, it cut off the land which has been intended to be occupied by levees and the canals. At the same time the meanderings of the Gila River showed its erratic disposition and also the Gila was a much more difficult river to control than the Colorado for the reason the Colorado rises slowly and gives warning. That is not true of the Gila. It also in extreme floods discharges more water and at a higher velocity than the great Colorado. For those reasons it is far harder to control the Gila than the Colorado. That is the principal reason for this change. Another is—

The COURT.—Where is that land in question?

A. It is this area in here (indicating on map, Deft's Ex. No. 5.)

The COURT.—Omitted from the project.

A. Between this river and the Yuma mesa (indicating on map.)

(Testimony of Arthur P. Davis.)

The COURT.—You were asked to state why it was not practical to include that in the project as originally planned.

A. One reason is the impracticability of controlling the Gila River by means of levees. Without levees these valleys will all overflow and their cultivation will be so precarious that we don't consider it feasible for the part nearest the river. Some of the higher lands may be cultivated but only a very small area for the same reason of the erratic condition and impracticability of controlling the Gila River within the limits of expense, which made it necessary to bring the main canal of the Yuma project down the river from the Laguna Dam.

Mr. MOLLOY.—The witness is absolutely stating as a matter of fact certain things are impractical. If the witness will testify in his opinion as an engineer, his qualifications having been admitted, that such things are impractical it may be admissible.

The COURT.—I understand he is testifying as an expert and giving his professional opinion.

A. Removing the main canal to the western side of the river, or the location of it before the construction, and crossing the Colorado River was due largely to this impracticability of controlling the Gila River so not to wipe out the crossing.

The COURT.—Was it ever contemplated that you would control either one of these rivers with levees?

A. Yes, levees have been built in the valleys and

(Testimony of Arthur P. Davis.)

this levee on the eastern bank of the Colorado is still in existence.

The COURT.—Do you mean the levees here (indicating on map)?

A. In a general way it is parallel with the river, but the original location of that levee has been obliterated and the present course is shown on the map and marked "Levee." [271]

The COURT.—This levee here along the red line?

A. No, the levee is along the Gila land shown on this map. Every time that river goes in flood it changes some part of its course and frequently very radically. Now the removal of the main canal to the west side of the river which was necessitated by the erratic habits of the Gila River, made it impossible to cover by gravity as large an area for the reason that a canal with very large discharge requires much less grade than a canal of small discharge so that a canal on the smallest practical grade and with a capacity proper for the irrigation of irrigable land in the Gila Valley follows a course roughly parallel, but lower than the original main canal and crosses the Gila River in the neighborhood of Sections 16 and 21. I have another map with the course sketched; that blue line (indicating on map.)

Mr. MOLLOY.—Will these maps be offered in evidence?

Mr. MORTON.—I have simply used them so far as illustrative of Mr. Davis' testimony.

A. The blue line on this map shows the approxi-

(Testimony of Arthur P. Davis.)

mate location of the canal headed at the Laguna Dam carrying sufficient water for the two Gila valleys and reaching to the neighborhood of Yuma. It leaves out a large portion of the upper part of both valleys; a portion of the north Gila valley having also been eliminated by the changes in the Colorado River reduces this acreage to only thirty-five hundred that can be irrigated by gravity. That area can be reached by pumping. That so radically changed the areas, on the basis of our knowledge in 1904, that in my opinion the system is not a feasible system. Another reason is one developed since that date. We found that the Colorado River passes freely under the levee and at the time of the high waters appears on the surface, so that the construction and maintenance of the levees does not protect them from overflow. It makes it necessary if they are to be irrigated to provide them with drainage canals of very large capacity, the water from which must be pumped into the river. We have had a very expensive and serious experience on the opposite side of the river, and where the Secretary of the Interior in an effort to do justice has allowed the people to abandon their claims and take up under preference homesteads in the lower Yuma valley in exchange. And they have suffered serious loss.

Mr. MOLLOY.—We are not, in this case, interested in the sufferings of the people on the north side of the river and we should confine ourselves to the issues.

Q. While Mr. Davis is on the stand and we are

directly dealing with that subject, I would like to offer the following in evidence; First, a certified copy of a letter to Mr. J. M. Thacker, President of the Yuma Valley Water Users' Association from Acting Secretary Vogelsang, dated August 13th, 1917. This indicates the restoration in one instance and intention to restore in the other and these lands are now excluded from the project. The other two, certified copies of the restoration of the lands to entry in the north and south Gila over the signature in one instance of Mr. Franklin K. Lane, himself, and in the other the first assistant secretary.

The COURT.—Have you examined them, Mr. Molloy?

Mr. MOLLOY.—Yes, and we urge all the objections and particularly this one. They are self-serving and not relevant or material and they are all dated subsequent to this action.

Mr. MORTON.—Mr. Davis has explained the method and there is no reason to assume that course was not followed in this instance.

The COURT.—This order of the Secretary of the Interior, this letter of the chief engineer, dated September 12th, 1917, and approved by the Secretary of the Interior, is admitted as is also the one of July 19, 1917. This however, this third document, seems to be a letter instead of an order. It refers to certain documents. The order itself would be the best evidence.

Mr. MORTON.—The two orders we have. This letter is introduced for the purpose, principally in

an accumulative way to show what was done. (Reading) "Therefore, this is to advise you that the lands east of the Colorado River and north of the Gila, and also such lands south of the Gila and north of the Yuma Mesa are not considered as part of the Yuma project." [272]

The COURT.—An official action would be better of what was done.

Mr. MORTON.—The restoration, of course, constitutes an official action in the sense that it is one of the things always done with lands not intended to be irrigated, but I think this shows also official action in the sense of the formal exclusion of the land from the project.

The COURT.—Has that reference to this particular land?

Mr. MORTON.—The same land.

The COURT.—I think the other will be sufficient. I sustain the objection to that.

Mr. MORTON.—As to the documentary evidence, is that also entered under Rule 46?

The COURT.—Oh, yes.

Mr. MORTON.—If I may be permitted, I would like to offer it under Rule 46.

(Said paper was marked for identification Defendants' Exhibit 2, under Rule 46.)

**Defendants' Exhibit No. 2.**

DEPARTMENT OF THE INTERIOR.
WASHINGTON.

Aug. 13, 1917.

Mr. J. M. Thacker, President,
Yuma Valley Water Users' Association,
Yuma, Arizona.

Dear Mr. Thacker.

On August 3, the Department revoked the reclamation withdrawal of the lands in what is commonly known as the South Gila Valley, being the lands south of the Gila River and East of Yuma, which had heretofore been withdrawn in connection with the Yuma project.

Investigations in connection with the Yuma project show that it is not advisable for the Government to undertake the reclamation of any lands in this area, and further that it is not advisable for the Government to undertake reclamation of any lands east of the Colorado River, and north of the Gila River.

Therefore, this is to advise you that the lands east of the Colorado River and north of the Gila and also such lands south of the Gila and north of the Yuma Mesa are not considered as part of the Yuma Project.

The withdrawal of these lands in the North Gila Valley has not yet been revoked, but investigations are now being made, and as soon as appropriate descriptions are furnished from the field an order

revoking the withdrawal now in force will be made.

Cordially yours,

ALEXANDER T. VOGELSANG,

Acting Secretary.

Copy to C. of C.

" " P. M., Yuma, Ariz. [273]

Mr. MORTON.—The other two were admitted?

The COURT.—Yes.

**Defendants' Exhibit No. 3.**

Washington, July 19, 1917.

The Secretary of the Interior (Through the Commissioner of the General Land Office.)

Sir:

From recent investigations in connection with the Colorado River Survey, Yuma Project, the withdrawal of the hereinafter described lands, withdrawn in the second and first forms, prescribed by Section 3 of the Reclamation Act of June 17, 1902, (32 Stat., 388), by Departmental orders of July 2, 1902, August 26, 1902, September 30, 1904, July 20, 1905, and May 12, 1916, no longer appears necessary to the interests of the project.

It is therefore recommended that so much of said orders as withdrew the lands hereinafter listed be revoked, *Provided,* that such revocation shall not affect the withdrawal of any other lands by said orders or affect any other order withdrawing or reserving the lands hereinafter listed.

These lands contain no power possibilities.

Colorado River Survey, Yuma Project, Arizona.

Gila and Salt River Base and Meridian.

T. 8 S., R. 21 W., Lots 1 and 2, NE. ¼ NW. ¼, S. ½ NW. ¼, NE. ¼, S. ½ sec. 17; Lots 1 to 13, inclusive; E. ½ NW. ¼, NW. ¼ NE. ¼, SE. ¼ SE. ¼, NE. ¼ SW. ¼, sec. 18; Lots 1 to 6, inclusive; NE. ¼ NE. ¼, S. ½ NE. ¼, SE. ¼ NW. ¼, E. ½ SW. ¼, SE. ¼ sec. 19; N. ½ NW. ¼, S. ½ SW. ¼, sec 20; W. ½ sec. 29; Lots 1 to 4, inclusive; E. ½ NW. ¼, E. ½, E. ½ SW. ¼, sec. 30; Lots 1 and 2, E. ½ NW. ¼, NE. ¼, sec. 31.

T. 8, S., R. 22 W., Lots 1 to 7 inclusive, N. ½, N. ½ SW. ¼, sec. 13; all sec. 14; Lots 6, 7 and 8, sec. 20; Lots 4 to 8, inclusive, SW. ¼ sec. 21; Lots 1, 2, 5, 6 and 7, S. ½ SW. ¼, sec. 22; Lots 1 to 14, inclusive, W. ½ NE. ¼, sec. 23; Lots 1 to 4, inclusive; NE. ¼, S. ½, sec. 24; NW. ¼, and SE. ¼, sec. 25; all sec. 26; NE. ¼, and S. ½, sec. 27; NW. ¼ and S. ½, sec. 28; Lots 3 to 7, inclusive, E. ½ NE. ¼, SE. ¼, S. ½ SW. ¼, sec. 29; Lots 6 to 11, inclusive, sec. 30; Lots 1 to 3, inclusive, E. ½ NW. ¼, NE. ¼, NE. ¼ of SW. ¼, N. ½ SE. ¼, sec. 31; N. ½, N. ½ SW. ¼, SW. ¼ SW. ¼, N. ½ SE. ¼, SE. ¼ SE. ¼, sec. 32; N. ½ sec. 33; N. ½ sec. 34; NE. ¼, N. ½ NW. ¼ sec. 35; all sec. 36.

T. 9, S., R. 22 W., Lots 1 and 2, sec. 5.

T. 8 S., R. 23 W., Lots 6 to 10, inclusive, sec. 23; Lots 5, 6 and 7, sec. 24; Lots 2 to 5, inclusive, NW. ¼, S. ½, sec. 25; W. ½, sec. 26; N. ½, N. ½ SE. ¼, SE. ¼ SE. ¼, sec. 27; N. ½ NE. ¼, N. ½

NW. ¼, SE. ¼ NW. ¼, SW. ¼ NE. ¼, sec. 35; N. ½, sec. 36.

Respectfully submitted,

A. P. DAVIS,

Director and Chief Engineer.

Aug. 3, 1917.

The foregoing recommendation is hereby approved, and it is so ordered. The Commissioner of the General Land Office is hereby authorized and directed to cause the records of his office and of the local land offices to be noted accordingly; also to ascertain whether the lands above listed are withdrawn or reserved by law of by any other order than those hereby wholly ~~served by~~ or in part revoked, and if not to cause due notice to be given that such lands will, at times fixed by said Commissioner in such notice, be open to settlement and entry.

ALEXANDER T. VOGELSANG,

1st Asst. Secretary.

Copy to U. S. G. S. [274]

**Defendants' Exhibit No. 4.**

Washington, September 12, 1917.

The Secretary of the Interior (Through the Commissioner of the General Land Office.)

Sir:

From recent investigations in connection with the Colorado River Survey; Laguna Reservoir, Colorado River Project; and Yuma Project, the withdrawal of the hereinafter described lands, withdrawn in the second and first forms prescribed

by Section 3 of the Reclamation Act of June 17, 1902, (32 Stat., 388), by Departmental orders of July 2, 1902; August 26, 1902; July 1, 1904; July 20, 1905; July 22, 1908; August 26, 1908; and December 14, 1908, no longer appears necessary to the interests of the projects.

It is therefore recommended that so much of said orders as withdrew the lands hereinafter listed be revoked, Provided, that such revocation shall not affect the withdrawal of any other lands by said orders or affect any other withdrawing or reserving the lands hereinafter listed.

These lands contain no power possibilities.

Colorado River Survey; Laguna Reservoir, Colorado River Project; and Yuma Project, Arizona.

Gila and Salt River Base and Meridian.

T. 7 S., R. 22 W., Lot 1 sec. 21; Lots 2 and 3, sec. 22; SW. ¼ sec. 23; S. ½ NE. ¼, W. ½ SW. ¼, and E. ½ SE. ¼, sec. 27; SE. ¼ NE. ¼, SW. ¼ SE. ¼, E. ½ SE. ¼, Lots 1, 2, 3, and 4, sec. 28; W. ½ NE. ¼, SE. ¼, Lots 1 and 2, sec. 33; E. ½ NE. ¼, W. ½ SW. ¼, SE. ¼ SW. ¼, and E. ½ SE. ¼, sec. 34.

T. 8, S., R. 22 W., E. ½ NE. ¼, W. ½, and SE. ¼, sec. 3; all secs. 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, and 19; NW. ¼, W. ½ SW. ¼, Lots 1, 2, 3, 4, and 5, sec. 20; Lots 1, 2, and 3, sec. 21; Lots 3 and 4, sec. 22; Lots 1 and 2, sec. 29; NE. ¼, Lots 1, 2, 3, 4, and 5, sec. 30.

T. 8, S., R. 23 W. Lot 1, sec. 12; all secs. 13, 14, and 15; Lots 1, 2, 3, and 7, sec. 22; NE. ¼, N. ½ NW. ¼, Lots 1, 2, 3, 4, and 5, sec. 23; N. ½, Lots

1, 2, 3, 4, 8, and 9, sec. 24; Lot 1 sec. 25.

Respectfully submitted,

A. P. DAVIS,

Director and Chief Engineer.

September 25, 1917.

The foregoing recommendation is hereby approved, and it is so ordered. The Commissioner of the General Land Office is hereby authorized and directed to cause the records of his office and of the local land office to be noted accordingly; also to ascertain whether the lands above listed are withdrawn or reserved by law or by any other order than those thereby wholly or in part revoked, and if not to cause due notice to be given that such lands will, at times fixed by said Commissioner in such notice, be open to settlement and entry.

FRANKLIN K. LANE,

Secretary.

Copy to U. S. Geological Survey. [275]

Mr. MORTON.—For its authoritative value and showing the conditions of the north and south Gila as to the Colorado and Gila River principally. We offer also this diagram or map as an exhibit.

Mr. MOLLOY.—There is a general objection as irrelevant and immaterial.

The COURT.—Overruled.

Mr. MOLLOY.—Note an exception.

(Defendant's Exhibit No. 5 admitted and marked. This Exhibit, having been by an order of this Court directed to be transmitted to the Circuit Court of

(Testimony of Arthur P. Davis.)

Appeals, for inspection by that Court, it is not incorporated here.

Witness resumes.—Drainage works are usually necessary in connection with any large irrigation project and have been carried out to the extent described in previous testimony on the Yuma project as the needs have developed. The introduction of a drainage system or the construction, however, cannot be wisely begun nor carried forward in advance of the need thereof because the needs are so various both in location and size that they cannot be wisely done. We have drainage works on a large number of projects for a great many years past and that is the universal testimony and observation of the engineers' experience in that time. We began the construction of the drainage canal in the lower valley some time ago. I don't remember how long ago—over two years—and immediately a protest was set up by the people in the valley against it, whose judgment was, it was not needed.

Mr. MOLLOY.—It seems to me that the witness is now interjecting hearsay matter, and we object to it for that reason and as not responsive to the question.

Q. Was this protest made to you?

A. Yes, sir.

The COURT.—Was it made by any one connected with this litigation? A. Yes, sir.

The COURT.—Overruled.

Mr. MOLLOY.—Note an exception.

(Testimony of Arthur P. Davis.)

WITNESS.—Written objections were made to the Secretary of the Interior and referred to me, and written objections were made to me personally and I was requested and urged to go to the Yuma Valley and hear representations on that subject, and I was there in Yuma visited by a large representation of the farmers of the Yuma Valley, most if not all of whom were members of the Water Users' Association, and some, I believe, were officers thereof. They presented me with a stack of cards, and a petition in strong terms requesting that the drainage be stopped and abandoned, and very strong representations were made to me at the same time to the same effect, and we at that time had two dredges in the valley, one was at work, and the other about to be put to work. I was of the opinion that the time for beginning had arrived; that something had already developed and it might be carried forward slowly and it was my intention to have two dredges there and perhaps order others if needed, but owing to those protests, having already started one dredge, we confined our operations to one dredge, and in this meeting I explained the operation with the idea that when we got to a certain point in the valley we would stop. There are, however, a few very limited areas that the rising water has threatened and consequently we have recently put in operation one dredge; the other dredge has been shipped out of the valley. The opposition to the drainage seems to be dying away owing to the realization of its need, perhaps. Ap-

(Testimony of Arthur P. Davis.)

parently construction work is more in the nature of maintenance work than construction, but the principal element in the drainage problem is not for the purpose of putting something else in the valley. It is in the nature of preventing destruction of what already exists and it cannot be wisely carried out unless done in the light of information that develops as irrigation proceeds. The conditions requiring drainage are underground conditions and no amount of investigation can bring forth all of the facts for two reasons. In the first place you can only ascertain the facts where [276] you probe the ground. In the second place, the borings or test pits or whatever method is used disturbs that condition so that the information you actually obtain is not very reliable. When you take earth out it is very difficult to determine whether that earth, in its original condition, was impervious; and that is the fundamental reason. An auxillary reason for the same fact is the impossibility of determining the economy or care with which people will irrigate. This is something we cannot control or predict—something the irrigator himself cannot control—it depends on the underground soil conditions, and for that reason it would be a waste of money to build the works very much, if any, in advance of their need; I am not able to say that it has not been a wise course, although not what I originally intended to carry out. It has been more conservative, although some areas may be waterlogged where we might relieve the land before it reaches the surface,

(Testimony of Arthur P. Davis.)

and other areas might be served at the same time, and we might have expended more money had we carried out the work earlier.

Q. Assuming that the public notice that was issued on April 6th, 1917, had been postponed until the piece of drain referred to by Mr. Bondesson—supposing that had been deferred until that piece of drain had been constructed, would you be able to say, then, that the drainage system was completed?

Mr. MOLLOY.—I don't see the relevancy of that question. Object to it.

The COURT.—Overruled.

Mr. MOLLOY.—Exception.

A. No, we couldn't, as I construe your meaning by the word "completed." Do you mean that more drainage would never be necessary in the valley?

Q. That is the idea.

A. I don't think that time will come in my life time no matter what we do.

Q. Then, for example, the mere building of the central drain is but the start on that work, is it not?

A. Yes, I think so; I may say it is an important start.

Q. Viewed from the standpoint of your never being able to complete it in the sense that no more would be necessary, it is a start; is that the idea you intend to convey?

A. The construction of the drain will by no means solve the drainage problem in this valley.

Q. Let us assume that we had this extra piece of drain constructed that was referred to this morn-

(Testimony of Arthur P. Davis.)

ing that you are working on now, would that be the completion of the drainage system in the sense of the fact that something else might not arise later that would require more drainage?

A. Something else would arise later.

Q. Now, when that had arisen and you had built an extra drain to that particular place, we will say in some locality where necessity had developed, where it seemed wise and not a foolish policy to build there, would there be any assurance then that there would not another place arise?

Mr. MOLLOY.—I greatly fear that unless I object that Mr. Morton will turn the entire project into a drain.

The COURT.—I think it is admissible in order to tell whether or not the project was completed.

Mr. MOLLOY.—Exception.

A. I think counsel for plaintiff has answered that as being a very speculative matter; that is true.

Q. On the other hand, what is the condition of the project? Is it in working condition so far as the Lower Colorado Valley is concerned; is it in working condition in so far as one is able to ascertain conditions at that time so far as the drainage canal is concerned?

Mr. MOLLOY.—Objected to.

The COURT.—Objection sustained.

Q. As a whole is it in a completed condition?

Mr. MOLLOY.—That calls for a conclusion of the witness.

The COURT.—Overrule the objection. I think

(Testimony of Arthur P. Davis.)

the witness may give his opinion.

Mr. MOLLOY.—Exception. [277]

A. As a practical matter, yes; the only sense in which the project is completed or ever will be completed.

The COURT.—When did that state occur?

A. A considerable time before the issuance of the public notice; the exact date I cannot mention.

The COURT.—Which public notice?

A. The one issued on April 17th, 1917, I believe.

Q. You say "as a practical matter, yes"; will you explain your answer there, please?

Mr. MOLLOY.—Objection renewed.

The COURT.—Overruled.

Mr. MOLLOY.—Exception.

A. I mean that the delivery of water and the facilities for the delivery of water and irrigating and cultivating that land are excellent and are hard to beat; that the drainage has been kept close up to the limit of practical economical construction and that no considerable proportion of the land in the lower valley, as irrigation projects go, has ever been impractical of cultivation or irrigation by reason of delay of drainage.

Q. Will, or will not it be necessary in the future history of that project to construct supplementary drains?

Mr. MOLLOY.—Objected to. Counsel is dipping far into the future. It is incompetent, irrelevant and immaterial and does not tend to prove or disprove the project is completed.

(Testimony of Arthur P. Davis.)

The COURT.—Overruled.

Mr. MOLLOY.—Exception.

The COURT.—I admit that in connection with the witness' testimony that the project was completed in 1917, and because there was some testimony on the part of the plaintiff that it was not.

Q. The point I want to bring out is as to whether or not there will not be some additional drainage necessary? A. Probably not.

Mr. MORTON.—I would like to offer in evidence a certified copy of the resolutions of the Board of Directors of the Water Users' Association of May 7, 1917, which requests a postponement of the construction of the drainage, which describes briefly what efforts have been made to reclaim the north and south Gila.

(Resolution admitted over objection, but no exception.)

**Defendants' Exhibit No. 6.**

M May 7, 1917.

"Mr. Winsor introduced the following resolution and moved its adoption:

"Whereas, many of the shareholders of the Association are of the opinion that a drainage system for the Yuma Valley portion of the project is not necessary at this time; and in view of this Board that a delay of six months in construction of such system will not result in harm; and that after the expiration of six months it will be possible to more certainly determine whether or not such system will be ultimately necessary;

(Testimony of Arthur P. Davis.)

It is RESOLVED by this Board that the Director of the U. S. Reclamation Service, and the Project Manager of the Yuma Project, be, and they are hereby, requested to suspend operations on the construction of the Drainage system for the Yuma Valley until November 1, 1917.

And that the President appoint a committee of three members to thoroughly investigate the subject of the proposed drainage system, and all matters pertaining thereto, and that the President, at the request of the committee, secure the services of a competent drainage engineer in making such investigation.

And the Secretary is hereby directed to furnish copies of this resolution to said Reclamation officials."

The foregoing resolution was duly seconded by Mr. Thurman and prevailed. [278]

Witness Resumes: Levees have been built along near the eastern bank of the Colorado River, the north bank of the Gila River, and, if I recall rightly, a little on the southern bank of the Gila River; canal construction has been carried on to some extent and considerable sums spent in the maintenance and operation of those works particularly the levees which require rock revetment, etc. And we have spent in the upper and lower Gila valleys in the endeavor to carry out a feasible reclamation of those valleys nearly six hundred thousand dollars. The efforts to reclaim these lands was not successful. [279]

(Testimony of Arthur P. Davis.)

Cross-examination by Mr. MOLLOY.

Personally, I did not conduct the surveys on the Yuma Project. The work was in charge of Mr. Lippincott from the first. He became supervising engineer at a later date than 1904. Mr. E. T. Perkins was one of Mr. Lippincott's subordinates. At the meeting at the Water Association office at which the Board of consulting engineers, of which I was head, consulted with the Directors of the plaintiff corporation and the land owners, I don't remember of anyone in my hearing mentioning thirty-five dollars per acre to the people gathered there; I have no doubt they did, however. I am positive that I mentioned no lower sum than forty dollars to that assembly as the cost price of the project, because some of my colleagues did not agree with that figure as it was a higher one than written in the estimate. The forty dollars was my particular figure. I do not remember myself, or any member of the Board, propounding to Judge Thacker the question, whether or not they could stand as much as thirty-five dollars per acre. It is quite possible that some other members of the Board did propound that question to Judge Thacker and to others assembled there. Our final recommendation to the chief engineer, Mr. Newell, as follows: "We recommend that Mr. J. B. Lippincott be instructed to proceed with the preparation of detail plans and specifications for the project and that the Honorable Secretary of the Interior be requested to give his general approval, and that a sum of three million dollars be set aside

(Testimony of Arthur P. Davis.)

in the reclamation fund for the construction thereof, subject to the fulfillment of the above-described requirements," I regard as merely a request for an allotment to construct the work and not in effect a positive recommendation and indirect positive estimate of less than thirty-five dollars per acre, or about thirty-five dollars per acre. It was certainly a fair interpretation of the law that, starting on a project of this kind, and proceeding immediately to let contracts, that the money should be in the Yuma Project fund before the contract was let. It is surely my interpretation of the law that a project could be started without money enough to finish it. Every project we have started is under similar conditions. If statements were made by Chief Engineer Newell and Mr. Lippincott that "the money is here, ready to now commence building, and the construction of the Yuma Project," the people of the Yuma Project who were present at the meeting of May 28th, 1904, were not [280] deceived. If he made such a statement, he probably believed it to be true. I did not believe it to be true that three million dollars was sufficient to construct the Yuma Project as contemplated. In so far as Mr. Newell and Mr. Lippincott made those statements they did not make the statements as described by the witnesses. I think I had a seat in the hall that night within hearing. I was there in company with Mr. Newell and Mr. Lippincott. Mr. Smythe who was a candidate for Congress was there. My testimony was that the three million dollars was an al-

(Testimony of Arthur P. Davis.)

lotment to undertake the construction of this project, and did not carry a conclusion it was sufficient to complete it. It was not my belief it was sufficient at the time. Looking over the detailed report that the Consulting Board of Engineers sent with the letter to Mr. Newell, I cannot point out wherein the detailed report does not show that the work could not have been completed for three million dollars. It shows the opinion of the Board who signed, including myself, that we thought it possible the construction therein described could be built for that sum. My recollection is that the aggregate of this estimate is a little bit less than three million dollars. There were a number of estimates. There were four different types of dam thought of; but the one finally selected and recommended, both in the written pamphlet in this case and mentioned by Mr. Newell in his speech and Mr. Lippincott, was an Indian-weir type, I believe. The estimate indicated that that was the cheapest type of dam suggested. The design to which they referred, however, was not the design which was afterwards built. At the time the Consulting Board met on April 8th, 1904, investigations so called, I believe, had been going on at that time, not to a large extent, however, for practically a year and a half. A larger force had been employed and much shorter time. Any way, ten of thousand dollars had been expended out of the Reclamation Fund, making those investigations and surveys. I do not recall the exact date when the larger force I speak of were put

(Testimony of Arthur P. Davis.)

to work; Mr. Lippincott may be able to tell us—considerably after that, though, and I was in Yuma in January, 1903, having come down the river, inspecting it. Work was then in progress, and the surveys in the [281] upper valleys and perhaps in the Yuma Valley, in making a general contour of the valley and in measuring the Colorado River; but no survey had then been started in the survey of the project. The force was gradually increased, and those preliminary investigations continued along the river from the Needles down, at places where they might possibly work out a project. In the winter of 1903 or 1904, the announcement was made by the supervising engineer that he regarded Yuma Valley as a preferable place. The nearest I can testify on that subject is that, some time in the fall of 1903, a force of considerable size was put to work and worked about six months on the location and surveys that form the basis of this report. I am not sure about the length of time; that would be my estimate. In my opinion, there is no possibility of drawing an exact line between preliminary and final surveys; they seemed to glide gradually into each other. Something seems to have been done in earnest, on a larger scale, in 1903. There had been six months, more or less, of very earnest effort to ascertain the cost of this project at the time we met as a consulting board, in Yuma, on April 8th, 1904. In my experience as an engineer, I know of many private enterprises that would have expended as much time and money in making surveys as on

(Testimony of Arthur P. Davis.)

the Yuma Project prior to April 8th, 1904, when the consulting board met. It is the rule, in substantial, reliable private companies, that really mean business and have money to expend, to make such extended investigations and expenditures of such large sums of money on making surveys; but I do not think that, when such companies expend those moneys and call in a board of six consulting engineers, and get their report and call for contracts in the sum of one million dollars, that they generally call that a completed survey. Large construction companies, such as railroads, power companies, etc., have surveys going on, practically continuous, while they are prosperous; they have parties trained in that character of work, and they keep them busy. I do not say that it does not seem to mean anything in private life that sums are spent on a consulting board and money set aside to build, and still they are not certain that they have any project; they always know that there is no certainty about an estimated cost. No engineer in his senses sets up to be a prophet; he simply gives his employers the benefit of his best judgment. The employer frequently feels satisfied to go on that judgment; I do not say, usually. It is positively not the usual thing in last 20 years that these projects are completed for the original estimates in the manner laid out after such great pains have been taken to [282] ascertain the facts and physical conditions. That has happened. Estimates have been made within which work was constructed; but that has not been

(Testimony of Arthur P. Davis.)

the rule in the last twenty years, and I want to state that the Panama Canal which was a private enterprise, was under investigation for many years before construction was begun and finally after the accumulation of fifteen or twenty years of surveys—after all of that information had been obtained and was reviewed and after an expenditure by them of hundreds of thousands of dollars in completing that information and a large number of the very foremost engineers attempted to estimate the cost of the Panama Canal, it then cost more than double what those gentlemen expected it to cost. Their judgment has never been attacked by people competent to do so, and the economy and efficiency of that construction has never been attacked. There were three causes that caused that canal, estimated to cost about one hundred and forty-nine million dollars, and which actually did cost between three and four hundred million dollars, were the same as the three causes which caused the Yuma Project—which was built contemporaneously with it, namely: the progressive increase in cost of materials and labor, the decline in the efficiency of labor and the encountering of difficulties not expected and changes in the canal that made it a better one than the one originally estimated—these are the same causes that caused the Yuma Project to cost more than the estimation of 1904.

Q. I am particularly interested personally in finding out what you mean in the decline in efficiency of labor? Has the human race deteriorated?

(Testimony of Arthur P. Davis.)

A. I cannot answer the last part of the question, but I can explain the decline of efficiency of labor. In our long experience on one of the projects which is situated as this, a considerable distance from population, at a place not usually sought by laborers, by large numbers of them, whenever wages are high and employment abundant, it is difficult to get men to go to these out-of-the-way places, especially where the work is temporary like the construction of a dam and not a permanent affair. We have to then, under those circumstances, pick up floaters, and they are a materially less efficient class of labor than is available under normal conditions. Not only that, but we found, in October, 1907, or September, that it was almost impossible, in fact was impractical, to keep a full crew of labor upon one of our projects, because every one was employed, and every one knew when he got tired of his work, that, by throwing up [283] his job he could get another in a few miles. It is true that, when J. G. White & Co., entered into the contract, these conditions did not exist then. J. G. White & Co. were somewhat deceived, too, when this inefficient labor condition was created.

The COURT.—I understand the witness to say 1907?

Mr. MOLLOY.—I was referring to some other period as an excuse of the White Co. to escape from its bonds.

Witness Resumes.—It is true that, when the J. G. White Co. entered into this contract, labor

(Testimony of Arthur P. Davis.)

was efficient. Part of this change in efficiency took place between June, 1905, and sometime in October, 1907, the major portion; but there was a progressive change in that direction beginning sooner, but there was no material advance in labor, nor any embarrassing shortage of labor until somewhere about the time I speak of. It was a gradual increase, and culminated in September, 1907, or October, 1907. I think the J. G. White Co. had about two years to complete the contract, but I do not recall positively. I did not hear Mr. Newell or Mr. Lippincott make any statements absolutely guaranteeing any very positive time as to the length of time to complete the project.

(Court adjourned until May 1st, 1919, at 9:30 A. M., and reconvened at that hour, and the cross-examination of the witness, Davis, is resumed.)

Witness Resumes.—I say that, in the first fifteen or twenty years, as a rule estimate for large works have been exceeded by the costs, because of the unforeseen advance in the price of labor and material. That is true of private works and railroad works. The construction of the works on the Northern Pacific Railroad cost more than its estimate, so the President stated to me. It is frequently the case that in large works, where capitalists are required to invest their money for such as the building of railroads or the construction of a canal, either irrigating canals, or transportation canals, such as the Panama Canal, that where estimates are made and capital invited to invest, it

(Testimony of Arthur P. Davis.)

cannot rely on the estimates of the engineers. The estimates are always necessarily based upon previous experience; and unless the future corresponds with the past in regard to the intended price of work, of course necessarily a discrepancy exists. It is always impossible to foresee what is going to happen. That was true before the war. [284] There was a progressive increase of cost from about 1900—very gradual at first, but increasing until the fall of 1907, the years 1906 and 1907 being years of extreme scarcity of labor and high cost of materials, especially in the west, reflecting also in the congestion of the railroads, which was another one of the elements of high cost. The impossibility of obtaining materials on time, due to congestion of railroads, was another important element in the increase of cost; and in October, 1907, there was a temporary slump, due to financial panic, and it was impossible to cash a Government check in the banks in the west. I remember that, to pay the employees on the Yuma Project, we had to ship money from Washington. It was impractical for an engineer to have foreseen this—some people might have seen it. To a certain extent. An engineer can take into account the gradual increase in wages sometimes, if he can foresee them. It is never safe to predict changes of that kind.

Q. What was meant in 1904 particularly, and what is meant usually by an engineer, when he says his estimates are liberal and are intended to cover all probable contingencies?

(Testimony of Arthur P. Davis.)

A. I suppose the engineer usually means to tell the truth.

Q. For instance, there is some evidence here tending to show that Mr. Lippincott and Mr. Newell on the night of May 28th, 1904, stated to the land owners that they had taken every contingency into consideration, and that if there should be a variance at all, it would be below rather than above the thirty-five dollars an acre?

A. Mr. Lippincott and Mr. Newell did not make all of those statements in my hearing, and I was there.

Witness Resumes.—I was at that meeting of May 28th, 1904. I have found memoranda in the official surveys that clears it up. I think, so far as I can recall, the Board did not expect or anticipate any increase in wages or price of materials, and they certainly did not predict congestion of railroad freights which increased the cost, nor did they anticipate the break in the Colorado River by which it became unnavigable. I know that the River did become unnavigable, because I tried to navigate it and failed because of low water. It had been navigable in low water previously. There was abundance of water there unless where the rapids were, between the Penitentiary Hill and [285] the Indian School, just on one occasion—that is the only one I had a personal experience of. For that reason, we built the railroad. We abandoned the navigation of the river. J. G. White & Co. was operating on the construction of the dam;

(Testimony of Arthur P. Davis.)

and when they failed, we took it, and knowing their experience of navigation, and that it was not a practical matter to depend upon the navigation of the Colorado River to carry supplies, which were very great, to the Laguna Dam, for that reason we abandoned the navigation of the Colorado River and built the railroad. It is not the truth that J. G. White & Co. were simply, by mutual consent between the United States of America acting through its Reclamation Service, that the contract was rescinded. The contractor stated in the most positive terms he was unable to finance the works. The contractor showed to the satisfaction of the Government officers he was utterly unable to complete the dam— It was a financial impossibility— His bankers or backers had refused to advance any more money. He was therefore unable to complete the dam, and was threatened with bankruptcy. It was a showing that the United States could not secure the completion of that dam through that contract, and that showing was of such a nature that the President and Secretary of the Interior made inquiries whether or not they had a right to release him from his contract; and the result of it all was that, by mutual consent, as reported by the Secretary of the Interior, J. G. White & Co. was considered as having abandoned the work. I do not remember all the details given in the printed report to Congress. They were permitted to abandon the work, I think, in 1907— January or February—January, when the steps

(Testimony of Arthur P. Davis.)

were first taken to that effect—the agreement was reached in January. In the fall of 1907, when the slump took place, during the Roosevelt panic, the Reclamation Service had been operating on the dam by "force" account about three-quarters of the year, under very adverse conditions, such as the increased cost of building the railroad at that time, I believe, and those adverse conditions had the effect of increasing the actual cost over the estimated cost. I would say that the actual cost of the whole project, including the work for which J. G. White & Co. had been paid, when the contract was annuled by mutual agreement, and all the work that had been done by the Reclamation Service, by force account, had been increased over the estimated cost; but I cannot say how much it had been increased, but largely so because [286] of the necessity of the increased cost of materials and labor. I couldn't give an approximate figure from memory. I would say that the Laguna Dam was about one-third completed, I guess, when the contractor quit, and probably about half, I should say altogether, in the fall of 1907. The effect of the three causes which I have defined in my past testimony was eventually to make the dam cost approximately double the original estimate. I could not say from memory what portion of the allotment of three million dollars was used up in the fall of 1907. We can find it from the books. That there had been a large excess of cost was very likely true. The personal property taken over by

(Testimony of Arthur P. Davis.)

the Government from J. G. White & Co. amounted, as I recall it, to something over a hundred thousand dollars in value. This material was taken from J. G. White & Co. upon the abrogation of their contract in February, 1907. I think the railroad was built subsequently by the Government—that is, the Government caused it to be built; I don't know whether it was built by Government forces, or not. I do not think I could give any idea of the amount in hundreds of thousands of dollars that the project had cost in excess at that time. I do not recall how far the work had progressed; but a large amount had been done. I mean, other work was in progress in the fall besides the Laguna Dam. Any figures that I might quote from memory, without consulting the books, I think would be valueless. It is not a fact that, taking into account the amount of material on hand, that there had been no excess in the expenditure over the estimated cost. I presume that the letter just handed me, which I am looking at, and purporting to be from the Secretary of the Interior, acting through his Assistant Secretary, G. W. Woodruff, and directed O. P. Bondesson and initialed by the familiar initials A. P. D. is genuine, assuming that the initials A. P. D. on this letter, are for Arthur P. Davis, myself, in my opinion it does not indicate, and it is not a fact, that there had been no excess in expenditure over the estimated cost. I think this letter—I regard this letter as somewhat misleading, because we did not, at that time, appre-

(Testimony of Arthur P. Davis.)

ciate the exact situation. The letter states, however, that the dam at that time was approximately half completed and the expenditures to J. G. White & Co. amounted to five hundred and sixty-five thousand dollars. That would indicate that there had been some increase in the cost, even if the estimate of one-half completion was correct, and that estimation, as it says here in rather [287] loose terms, it was a mistake to assume the dam was half completed at that time.

Q. Mr. Davis, if you will pardon me a moment, of course the letter will be in evidence and it will have to speak for itself; but the letter does not state that the dam is half completed; but it does say that the project, as a whole, was about half completed August 31, 1907? A. It so states.

Mr. MOLLOY.—We will have the letter filed as Plaintiff's Exhibit. I understand that the Court's method of conducting business is that the opposite side does not put in evidence during cross-examination.

The COURT.—No. You may offer evidence in rebuttal.

Witness Resumes.—Notwithstanding that the letter itself does state that the project as a whole was about one-half completed, I will say in my opinion that the actual cost had greatly exceeded the estimated cost on August 31st, 1907. I will say that the letter is misleading. It was not intentionally so, but we were depending upon reports of the project; and I subsequently found that there

(Testimony of Arthur P. Davis.)

was a habit of stating percentage of completion by project managers which I took pains to correct, judging the completion upon expenditure and not upon the work accomplished, it was of course an erroneous method. That method was corrected subsequent to September 25th, 1907. I think the land owners and Water Users Association could rely on the honest efforts and attempts of the Government engineers to do the work economically and efficiently, and the work was so done in good faith. I do not think anyone intentionally misled them. I am sure I did not. The type of dam that was adopted for the Yuma Project was a modification to some extent of dams built in India and sometimes called an Indian Weir type of dam; but an important modification was finally introduced and consented to by the United States, due to the difficulty of carrying out of the particular type adopted. The dam that was started to be constructed by the J. G. White & Co. was more nearly like what you call the Indian Weir type of dam than it was the other types; but it was a modification of any dam ever built in India, also a modification of the so-called Indian Weir type of dam set forth in the design and specifications in the contract of the J. G. White & Co. It was neither the dam figured in the estimated cost to be nine hundred and eighteen thousand dollars, nor the concrete steel type at one million three hundred and thirty thousand dollars, but more nearly like the first. I do not recall the figures, the estimate [288] on that.

(Testimony of Arthur P. Davis.)

The report does not contain any estimate on the type of dam actually built—this report does not.

Q. (By the COURT.) According to the way this testimony is introduced, it would appear that I am to pass on the cost of the project?

Mr. MOLLOY.—Yes. I understand that is defendant's theory. We contend there was an estimated cost.

Mr. MORTON.—That is not our theory. Our theory is simply that the Secretary in a public notice of April 6th, 1917, estimated the cost, based on the actual cost of the work. We are perfectly willing to give the facts.

The COURT.—I don't want the facts and I think a great deal of this testimony introduced on direct and cross-examination cannot help this court. I am not to pass on the value of the work done. If too much money has been expended of no real good to the owners of the land, that is a matter to go through Congress. I cannot pass on the charges made. I have to decide whether the estimate in 1904 or 1917 is right, and I don't see how on earth all this testimony will help me.

Mr. MOLLOY.—They insist that no estimate was made at that time. I cannot understand how there can be two estimated costs.

The COURT.—And you contend that was the estimate contemplated by the Reclamation Act?

Mr. MOLLOY.—Yes, now to offset their theory we are now cross-examining this witness and showing that whatever estimates were made, we are in-

tending to show that everything bore out the bids of the contractor, the actual cost at that time, that the estimate was final.

The COURT.—Yes, but isn't that a question of law?

Mr. MOLLOY.—Yes, but if the Court please it seems to me it would throw a great deal of light on this if we could show, in the nature of things, they must be final. If Mr. Davis and his distinguished associates estimated this dam as seven hundred and ninety-seven thousand dollars and J. G. White & Company took the contract for seven hundred and ninety-seven thousand dollars, I think it is an important thing to go before the Court and certainly opposes their theory that any estimate made in 1904 was purely tentative and meant nothing, and we had no right to rely on that.

The COURT.—In other words, you think if the fact that the figures show [289] the estimated cost of about thirty-five dollars an acre, that should control the Court in determining as a legal question whether or not the notice issued by the Secretary was the notice prescribed by the Reclamation Act?

Mr. MOLLOY.—No, I don't think it would be any aid as to the notice. We contend that the estimated cost and the notice required by the Reclamation Act are two entirely different things and we are just required to pay the estimated cost.

The COURT.—How could any estimate by these engineers, whether they stated it as a positive fact or as their opinion, have anything to do with the

legality of the notice issued by the Secretary of the Interior? In other words, they might have stated that the project was going to cost twenty dollars an acre, now if the Secretary of the Interior didn't issue the notice required by the Reclamation Act certainly the Government could not be bound by any estimate made by the engineers.

Mr. MOLLOY.—I think not, your Honor.

The COURT.—If the engineers stated it would not cost more than forty dollars, and if the land owners didn't see to it that the Secretary of the Interior issued the notice required by law before they obligated themselves could any negotiation be binding upon the Government? The notice and estimate is to be issued by the Secretary of the Interior. Now then regardless of what these engineers did, if the Court is compelled to hold that no such estimate was made by the Secretary of the Interior, then all that was said in connection with the cost in 1904 would be of no bearing whatever.

Mr. MOLLOY.—That is probably true, but we prefer to get it in the record.

The COURT.—I understand. I am willing that you get it in the record, but I cannot see how it is going to help the Court. I shall not allow the defendants to introduce any more testimony on this line except to contradict the evidence introduced by you. I merely interrupted you to state that inasmuch as in order to decide this case, I must pass on the legal questions, inasmuch as the preliminary

obligations, in my judgment, have no force whatever on the Secretary of the Interior, I permitted you to introduce testimony tending to show these engineers made a statement as to the cost, not because I thought it was material but in order that you might, if you saw proper to appeal the case if you lost, have an opportunity to present that matter to the Court under Rule 46, and I do not in the least intimate that I am going [290] to hold that the notice and estimate made in 1904 was not the notice required by law.

Mr. MOLLOY.—We understand that. We didn't assume that you are intimating a decision in any way.

The COURT.—What I want you gentlemen to do is to aid me in determining that one question. All this business about the cost of the project and irrigating that piece of land cannot have any use in the determination.

Mr. MOLLOY.—We desire to be brief, but there is a subsidiary question in this case. There is but one question in the matter, but there are alternatives in the case. If the testimony just given is to be applied in full force, we then might ask for equitable relief under the contract and we entered into a contract on that view of the case. I think this testimony would be relevant whether it had been brought out in direct examination or not, I should have asked to examine under Rule 48 if it goes to a higher court.

The COURT.—If these land owners were misled

(Testimony of Arthur P. Davis.)

and Congress is convinced of that, their remedy is to appeal to Congress, that is, provided, of course, the Government is not bound by the so-called estimate of 1904.

Witness Resumes.—Myself and my associates on the board did make an estimate of the proximate cost of the dam, say nine hundred and fifty thousand dollars, and a dam of approximately that character and cost was ultimately started to be constructed under contract, and it could not have been constructed at that cost, nine hundred and fifty thousand dollars. I don't doubt the statement that page 99 of the Fourth Annual Report of the Reclamation Service made by the Secretary of the Interior to Congress, shows that J. G. White & Co. was awarded the contract sometime in June, 1905, presumably immediately after June 5th, 1905, for the sum of seven hundred and ninety-seven thousand, six hundred and fifty dollars. That is right. There were a series of other bids for the same work, the largest being a million and thirty thousand dollars by the Sherman Machinery Company of Oklahoma; but these bids did not apply to the cost of the dam. They did not include all of the cost of the dam. Those bids fairly well substantiated and supported our original estimate, and they did not include all of the expense of the dam; they did not include the cement furnished; they did not include the engineering supervision furnished by the Government, nor preliminary surveys, nor reinforcing steel furnished by the

(Testimony of Arthur P. Davis.)

Government; they did not include overhead charges the Government has had. The overhead charges consisted of proper salary of [291] the Supervising Engineer, proper salary of the Government officials, pro rated over various projects in accordance with expenditure of inspection made from time to time, and similar charges. The Government bought all the cement, paid the freight on it and bought all the reinforcing steel. They went into actual construction, with their own superintendent, shift bosses and foremen. The Government had inspectors there to see the work was done properly. There were estimates upon levees made also by our consulting board in 1904; and we computed the amount per yard that the dirt could be moved for. In the report was an estimate here of the cost of the movement of earth under the California Canal, estimated at fifteen cents per cubic yard. There might be some difference in the cost of the formation of a canal and the movement of the earth for a levee in the same neighborhood, depending on the material largely. I would say that the bid of Miller & Peaslee for many miles of the levee, which was accepted at thirteen and one-half cents per cubic yard approximately supports our estimate. I do not recall the exact figures. From April 8th, 1904, there were further investigations prosecuted without cessation, to ascertain about the crossing of the Gila by the inverted siphon. The consulting board did not so decide. It was not entirely satisfied with the plans submitted in their

(Testimony of Arthur P. Davis.)

report which has been placed in evidence, if I recall correctly, requested further investigation, at any rate further investigations were made; and it was finally decided that a feasible and safe crossing of the Gila River by the main canal could not be practically made—that was several years afterward. Perhaps there was a plan for quite a while, whereby plans were laid and specifications drawn for the main canal to cross the Gila River; but credit for working out a change in setting forth extra hazards of the water supply to the lower part of Yuma Valley by exposing the main canal to attacks of the Gila River is due to Mr. Sellew, who was in charge of the project at the time the change was made, and it meant a very important matter in the permanency of the water supply of the lower valley, in my judgment. I do not know that Mr. Sellew suggested it originally. I know he made a recommendation of investigation which led to that conclusion, which I investigated and approved. That was very likely subsequent to June 31, 1906. There is a statement in the Fifth Annual Report that the main canal would be carried under the Gila River by means of a siphon twenty-seven hundred feet long, showing it had been relocated. In my view, the tentative estimates are to be [292] become final estimates, and the land owners are given to know what they have to pay when the Secretary of the Interior promulgates his estimate, and not until then. We delivered water to a large portion of tract C before the issuance of Public

(Testimony of Arthur P. Davis.)

Notice. We completed the Yuma Siphon, as I recall, in 1912, and delivered water through it at that time. Previously, we had purchased existing canals that were no longer in operating condition, and had served the lands from those canals from the time of the purchase, the date of which I do not recall; but quite a while previous to 1912; and after the completion of the Colorado River siphon, we delivered water by gravity to those and other lands, at less than cost of operation from that time until this. It was some considerable time after the completion of the siphon before we were ready to deliver water to all the lands in the finished project, that is Tract C. The reason that the promises of Mr. Newell and Mr. Lippincott, if made, that the levees and canals could be, and would be, constructed prior to the completion of the Laguna Dam, or simultaneously therewith, were not performed, was the lack of funds. We had a great deal of work in progress, and the rapid advance in the cost of work throughout the country, together with other unforeseen occurrences, made us very short of funds. It was very difficult to obtain the funds, and that fact was recognized by Congress in 1910, in the form of additional legislation to authorize the transfer of twenty millions from the General Fund to the Reclamation Fund, in order to expedite the completion of the various projects. The appropriation was made to provide in the same act that created the Army Board, and the Army Board followed it and passed upon the

(Testimony of Arthur P. Davis.)

feasibility of the projects under way. The report of the Army Board was made public. I do not recall what the Army Board said on the subject, if anything; they considered the project as a whole. I do not know what reference they made to the Gila portion. I will say now that my knowledge of the physical conditions and the history of the project on the river, that in my judgment, the Gila portion of the project should have been eliminated from the start. We should never have attempted it. It never in my judgment was in such a state of feasibility that it should have been attempted, and it became progressively more difficult by the rather remarkable incursions of the Colorado River, by the north part of it cutting out a large amount of gravity acres; so that the facts are very much stronger now, as well as our knowledge is very much stronger, against the feasibility of that [293] unit than it was in 1904. In other words, our hindsight is very much clearer than our foresight. In 1904, I had access to all public records of the Land Office, I suppose, but I don't recall ever having seen the plat of Fractional Township 8, South Range 22 West, G. & S. R. Meridian, in Arizona. I do not know whether it was there or not.

Q. This plat, Plaintiffs' Exhibit 11, I think shows approximately the meandering of the Colorado River in Fractional Township 8 south, range 22 west, in 1875. Now you have the plat—when I say you have, I mean, of course, the Reclamation

(Testimony of Arthur P. Davis.)

Service—the plat furnished to Mr. Bondesson on the morning of May 28th, 1904, as testified to by Mr. Bondesson, which shows that the Colorado River had made considerable incursions in that township by Avulsion, we will presume.

A. Where is that?

The COURT.—Now, do I understand your position, Mr. Molloy, to be that even though he didn't examine this map about which you inquire, if he had examined it he would have found certain things, and therefore he was negligent in not doing so.

Mr. MOLLOY.—In a sense, your Honor.

The COURT.—Well, does that affect the legal question involved in this case?

Mr. MOLLOY.—Perhaps not, but we are desirous to show conditions; that while the Secretary of the Interior is not infallible, it seems to me even the Secretary of the Interior when he invites land owners to come and execute a mortgage on their lands, even the Secretary of the Interior should, in a sense, be estopped from saying that the project was always unfeasible. I am quite sure this is proper cross-examination and we are very desirous even if not, to get it in the record.

The COURT.—Well, proceed.

Q. The two plats together show a decided movement of the Colorado River to the southeast.

A. Yes, sir.

Q. And that has progressed continuously in that direction ever since? That is true all of those years from 1904 until you finally declared that

(Testimony of Arthur P. Davis.)

portion of the project was abandoned in 1917—the Colorado River had been cutting towards the Gila River in a certain direction? [294]

A. I don't think you can apply that to these maps, they don't show it. These maps are the same date?

Q. No, this map shows the approximate addition of the public land surveys in 1875.

A. This map does not show that, that I see. Where is the date, 1875?

Q. Of course, it must be presumed the plats were filed in the office and they have but one set of plats.

A. But hunting up the date of that survey you would know that was the course of the Colorado River at that time?

Q. Yes.

A. Oh, I see. That, however, is merely an illustration of the fact that the Colorado River meanders. We knew that.

Q. And it kept meandering in a southerly direction after 1904 until you announced or caused the Secretary of the Interior to announce that you abandoned the Gila part of the project in 1917?

A. I presume that is true. That is only one of the elements of the Gila project.

It was expected in 1904 to erect levees on the south bank of the Colorado River and on the north bank of the Gila River through the township (8 south, 22 west) we have been looking at on the plats, but I am not sure that it was to be within two years. We built a great deal of levees, but none

(Testimony of Arthur P. Davis.)

very fortunately on the portion where the Colorado River during all those years has been cutting southerly towards the Gila River, and none on the Gila River where it is cutting north towards the Colorado—I am sure of that. It would have been better engineering if we had made no attempt to prevent those rivers from running wild. It was better by far to allow those rivers to run wild and not to have grasped hold of them and placed them in levees as shown on the plat, Plaintiffs' Exhibit 26. That is what I recommend now. It was unfortunate that we ever started that portion of the project. We lost between five and six hundred thousand dollars by that. I made no promises concerning those rivers in 1904. I do not regard those plats showing that levees would be constructed and the statements of Mr. Newell and Mr. Lippincott that they could be and would be constructed in two years from the time the work began, as promises; they were simply statements of Government officials made, [295] and not to my knowledge, even to the extent stated, to be done in two years. I have already stated, I think, the time of the contract J. G. White & Co. entered into to build the dam was two years. I cannot say what would be the approximate cost, assuming the feasibility, of grasping hold of the two rivers in the manner indicated by Plaintiffs' plat 26 and leveeing and controlling them. I cannot give even a rough figure. I have not even the memoranda necessary, much less the unit price; and that has been gone into by myself and others and we

(Testimony of Arthur P. Davis.)

have found the difficulty so great and the chances of successful reclamation so remote and the hazard too great, to talk price. I do not know when that determination was arrived at. I formed my opinion regarding that—I think I began to have doubts about it long before—but conclusive opinion on that point, I think, was arrived at in 1915, probably about the last of the year.

Mr. MOLLOY.—Q. What I want to know is, when was it finally officially decided on by the Secretary of the Interior?

Mr. COFFEY.—There are two instruments in evidence and they are conclusive upon that.

Mr. MOLLOY.—All right. If they are stipulated so, we will accept that time.

Witness resumes: The meeting at which the protest was made to me about the drainage was called by the water users, and attended by them and they passed a resolution requesting the postponement of the drainage, at another time—they did not pass it at that meeting. The protest didn't have the effect of stopping the work on the drain, but had the effect of checking it—it slowed down the work. We came to an agreement as to what should be the program; and that has been followed. There is about thirteen miles of the main drain constructed, as I recall, and the total artery, as shown on the original map exhibited in 1904, to which so much reference has been made, and shows about fourteen miles of drain to be constructed and some rectification of cutting out of the lagunas, but I think none of the

(Testimony of Arthur P. Davis.)

rectification has been made yet. Nothing has been done on the Gila portion of the project; and nothing is going to be done, as I understand the plans. As to the lands included in Tract A, the Reclamation Service furnished a few of the people *there* water for a great many years at less than cost of operation. It was operated on the ground by men in the valley. I do not include in that the overhead [296] charges—it was less the operating charges on the ground.

It is my recollection that the time of the completion of the J. G. White contract is two years, as stated in the contract itself. As to whether or not the dams and levees, if there had been funds for that purpose, could have been completed very easily, simultaneously with, or prior, to the completion of the dam, would have depended on how the river acted, and what luck they had in holding it.

Q. Now assuming, as you must have assumed in 1904, that the rivers would not have made any inroads on levees or dams—

A. We didn't so assume, but that is a fact though.

Mr. MORTON.—We furnished you not only the contract with the water company, but an extension of time in order to deal with the matter as a whole. That should be revealed in some manner.

Mr. MOLLOY.—Well, if it is important.

Mr. MORTON.—I don't know whether it is important or not, but you are trying to bring out the time.

Mr. MOLLOY.—In view of your theory any esti-

(Testimony of Arthur P. Davis.)

mate made in 1904 is purely tentative and not the estimated cost.

Mr. MORTON.—You have misstated our theories.

The COURT.—We are losing time, pardon me for interrupting.

Witness resumes: No. A great deal of the troubles between the Yuma Project and the Reclamation Service were not caused by the fact that the three million dollars allotted, as I have said, by the Secretary of the Interior for the construction of the Yuma Project was taken out and disposed of in the construction of other projects. We spent more than three million dollars on the Yuma Project. There was no physical segregation of any particular money allotted to that project. The sum of three million dollars was allotted and spent. It was not all spent within two years; but the work was for a longer time than two years, progressively prosecuted, and some results were obtained from it; and I had no intimation at that time from people, nor at this time, that we were breaking any promises by our operation.

The COURT.—What is the number of the paragraph of the contract between the Association and the Secretary which applies to the completion of it?

Mr. MOLLOY.—Number 4. [297]

Witness resumes.—The letter that you put in evidence (Plaintiff's Exhibit 34) states the approximate amount that had been expended at the end of the fiscal year 1907. It shows but very little over half the allottment had been expended. The ex-

(Testimony of Arthur P. Davis.)

penditures made during 1906 and 1907 were made during the periods of extremely high prices; and I think that fact influenced the contractor of the Reclamation Service and his assistant to a considerable extent in the avoidance of undertaking new structures that had not been undertaken at that time, in the interest of economy on behalf of the water users. By "new structures" I mean structures not yet commenced. I do not mean that the money was actually there and could have been used for the Yuma Project; but was not used on account of the advance in prices. I said that was one of the influences. The Reclamation Fund had money in it at that time however.

The COURT.—As I understand you, no particular portion of the appropriation was set apart and designated Yuma Project, or for any other particular project?

A. Yes. The three million dollars was, by letter of the Secretary of the Interior, set aside for the Yuma Project; and so far as my recollection goes, it was never encroached upon, and the allotment was never changed until spent and more money allotted.

Q. Then it was not for lack of funds that those canals and levees were not constructed prior to, say June 30, 1907, or August 31, 1907?

A. The lack of funds did not appear as early as that. No, but that was one of the influences that came in later to modify the plans of all projects.

By the COURT.—You are, no doubt, familiar with Paragraph 4 of the contract between the

(Testimony of Arthur P. Davis.)

Water Users' Association and the Secretary of the Interior—Are you not? Will you read that paragraph.

A. (Reading.) "That the payment for the water rights to be issued to the shareholders of said Association under the provisions of said act of Congress shall be divided into not less than ten annual payments; the first thereof shall be payable at the time of the completion of said proposed works or within a reasonable time thereafter, after due notice thereof by the Secretary of the Interior to the Association."

Q. Now, I would like you to state whether or not the proposed works have been completed; and if so, when they were completed? [298]

A. As a practical proposition, I consider they are. The completion—practical completion was made at the time we were able to deliver water to the area within the lower Yuma valley, the exact date of which I do not remember; but it preceded the issuance of the public notice.

Witness resumes.—(In response to interrogatories by the Court.) It is my opinion that, under the law, the Secretary of the Interior was permitted to eliminate we will say the north and south Gila; and the failure to complete the works which would serve those respective tracts would not be a failure to complete the proposed works or projects referred to in Section 4 which I have just read. The contract between the Secretary of the Interior and the association specifically gives the Secretary the right

(Testimony of Arthur P. Davis.)

to determine what land shall be served; and he exercised that right in eliminating the Gila units; and I think that the "proposed works" referred to in that paragraph of the contract, should refer to the proposed works as finally constructed by the Reclamation service, and as finally determined by the Secretary of the Interior. I think that the practicability of including any area in the works necessary to serve that area are matters left by the contract to the decision of the Secretary of the Interior; and he announced that decision in a public notice of April 17; also, about the same time, or shortly after, he wrote a letter to the President of the Water Users' Association announcing his decision to eliminate the Gila unit as impracticable.

Q. (By the COURT). Now, then, if as is contended by the plaintiff, the Government should be required, as a condition to its right to receive first payment to complete the work so as to include within the project the north and south Gila and to serve the land with water, do you think that could not safely be done, and is not feasible as an engineering project, regardless of what it might cost?

A. Well—"Feasible" and "cost" cannot be separated; but I think the statement is true nevertheless, because a large portion of that land cannot be safely improved and settled upon on account of the physical conditions which, irrespective of cost, their safety is not a reasonable certainty.

Q. Then, as I understand you, that was not fully appreciated in 1904? A. Absolutely.

(Testimony of Arthur P. Davis.)

Q. And only after your experience with the Gila and Colorado River? A. Absolutely. [299]

Q. And, after such experience, it was deemed unwise to embrace the north and south Gila within the project at any cost? A. Yes, sir.

Q. Even though you may have had all the funds available necessary? A. Yes. That is true.

Witness resumes.—(In response to questions by Mr. Molloy.) In that connection, I will say that we had the data about the previous floods in the Gila River prior to 1904, for instance, the stupendous flood that resulted from the Walnut Grove dam in 1890. We had those facts before us, roughly, as near as anyone had them. I do not think that the freshet of 1890, resulting in the Walnut Grove disaster, and the extremely high flood of 1891 greatly exceeded any flood occurring since. I think there has been a flood since that was greater; but those were great floods and reasonably indicative of the habit of the river as to discharge and as to its character as testified by me yesterday. As an engineer, assuming but not admitting the feasibility of the Gila portion of the project, I will say that the Yuma project is completed in accordance with paragraph 4 with respect to the lands that can be irrigated. The essence of that contract is that we shall not charge those people in advance if we are giving them a supply of water; and we have furnished such a system, and are giving such a supply in Yuma valley; and I take this position, not on my own motion, but in following a long line of prece-

(Testimony of Arthur P. Davis.)

dents established by the Secretary of the Interior.

Q. Well, the precedent of course will be forthcoming in the ruling of the Secretary, but your answer at least, I think it does not quite respond to the question. Leaving out of the question the benevolent things you are doing for the people in the lower valley—Tract C, I am asking you as an engineer, assuming, not admitting that the Gila portion of the project is feasible, has the Yuma project, the works referred to in the contract with the Secretary of the Interior of May 31st, 1906, been completed?

A. As to the lands of the Yuma valley, yes.

Q. Not as to lands of the Yuma valley solely, but as to lands within the lower Colorado Irrigation District described in the contract, meaning the upper and lower Gila or north and south Gila and delineated and annexed to the plat as Tracts A, B and also Tract C, that is, quoting the language of [300] the Secretary of the Interior on September 25th, 1907, now, is the project as a whole completed, assuming, not admitting, the feasibility of the north and south Gila?

A. That hangs upon a legal question I don't believe it is your purpose to bring out.

Q. I wish if it is humanly possible for the purpose of answering this question that we exclude all law, and we want your opinion as an engineer.

A. My answer is yes.

Q. You still say as an engineer that is your answer?

(Testimony of Arthur P. Davis.)

A. Yes, I say that because the Yuma project has, irrespective of feasibility, without admitting or denying feasibility, has been reduced by the elimination of the Gila valley by the Secretary of the Interior who had and has the power under his contract with it to reduce the project for any reason he sees fit, and he has so reduced it and completed the project in accordance with the terms of the contract.

Q. Don't you think it is self-evident or begging the question?

A. If you question whether the irrigation works is completed for the Gila valley, I would say no.

Q. No, applying my question to the project as a whole and assuming, but not admitting the feasibility of the Gila portion of it, excluding from your mind for a moment, if you can, any rulings of the Secretary of the Interior, can you say the Yuma project is completed? A. Yes.

The COURT.—In other words, you hold that the Yuma project as referred to in the contract means the project which was determined to be completed after the elimination of all lands which was not practical to embrace within the project?

A. After the elimination of all lands which the Secretary might decide to eliminate. I would not think he had the right to eliminate lands without adequate reason, but the contract gives him that right.

Q. Now, going a little further and assuming that the Secretary of the Interior had neither the moral

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nor legal right to exclude any portion, and assuming a further fact for the purpose of the question, that he hadn't actually excluded any portion or attempted to exclude any portion, and still further assuming the feasibility of the Gila portion of the project, would you still say the Yuma project as a whole had been completed? [301] A. No.

Witness resumes.—The cost as is finally determined by the Notice of April 6th, 1917, is a combination of the actual cost and the estimated cost. It is actual cost of work already done that is charged and chargeable to that part of the land irrigated and the estimated cost of what will be necessary from time to time in drainage works—seventy-five dollars per acre. The actual cost is not the entire cost of the dam, only a certain proportion. The cost of the dam is, of course, involved with the rest of the cost; but a portion of it is charged to the lands on the California side and a portion charged to the lands of the Yuma Mesa, which may or may not be irrigated in the future; and the project has been given the benefit of the doubt, assuming that the Yuma Mesa will sometime be irrigated and return its part of the cost. They have been given the benefit of the doubt even as to the Imperial Valley, paying a portion of the costs of that dam. Speaking for myself, but not for Mr. Lippincott and Mr. Newell, I would say that it has not always been contemplated that ultimately the great Imperial valley would be added to the Yuma project and pay their proportion of the dam, and thereby the cost given

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in 1904 will be greatly reduced as testified to by Mr. Bondesson. The reason I gave forty dollars when they asked me for a figure, I thought they would have that much to pay. I think it was considered likely that the Imperial valley would be compelled to go to the Laguna Dam for water. The Imperial Irrigation District has contracted to pay the United States one million, six hundred thousand dollars for the use of the Laguna Dam, if they ever make connection with that dam. That contract has been signed up and the million six hundred thousand dollars has been assumed as an offset in project of Yuma and not included. This contract was entered into subsequent to the issuance of the public notice. It is a very recent contract, all these negotiations taking place along about 1918; and there is now existing a contract whereby the Imperial Irrigation District in California agrees to pay to the United States one million six hundred thousand dollars of the cost of Laguna dam, and that sum has been credited and used as an offset, as a similar cost incurred for the benefit of the Yuma valley, and the public notice of seventy-five dollars an acre so assumed. The public notice of seventy-five dollars per acre still stands, and [302] the plaintiffs get credit as they make future payments. It has already been credited very well, because the actual cost has been reduced by that amount in arriving at seventy-five dollars an acre. In my view, the plaintiffs have no interest at all in the million six hundred thousand dollars, and that is the view ex-

(Testimony of Arthur P. Davis.)

pressed by the Secretary of the Interior, Franklin K. Lane, and the Government officials who were present at the meeting in which Mr. Winsor represented the Yuma County Water Users' Association. I do not think that Mr. Winsor and I disagree. The Secretary absolutely took that view, as well as Mr. Winsor and those present.

The COURT.—Do you think that is material in this case?

Mr. MOLLOY.—Not at all, on your Honor's indication. I think we can make it so yet. I think we can ask for a supplementary pleading.

Witness resumes.—Assuming that the pamphlet which is now handed me contains what is approximately a correct copy of the contract between the Imperial Irrigation District and the United States to pay one million, six hundred thousand dollars for the use of the Laguna dam, Section 9 thereof reads: "For the right to use the Laguna dam, the main canal and appurtenant structures and divert water as herein provided, the district agrees to pay the United States the sum of one million, six hundred thousand dollars in twenty annual instalments, the first of which shall become due and payable December 31, 1919, and subsequent instalments annually thereafter, the first four instalments shall each be two per centum and the next two instalments each four per centum and the next fourteen each six per centum of the total amount. Upon failure of the District to make any such payment at the time and in the amount specified, then all rights under this

(Testimony of Arthur P. Davis.)

contract shall be at an end, and all payments theretofore made shall become forfeited to the United States as liquidated damages, and as a further consideration for entering into this contract on the part of the United States, the district hereby releases and relinquishes any and all claims whatsoever for said moneys or any portion thereof so forfeited and paid as liquidated damages, provided that the Secretary of the Interior may in his discretion extend the time for any such payment upon the payment of seven per cent interest in advance." That contract has been executed by the parties to it. It is a contract providing that the Imperial District shall have the right of connecting with the Laguna dam. I [303] do not think they had any plans for doing that until comparatively recently—either two, or three years ago. I never disapproved of giving Imperial valley the right to connect with Laguna dam; but I have always considered that was very problematical and very much in the future and very doubtful. I did not say that credit was given to the Yuma project for this one million, six hundred thousand dollars long in advance of this contract being entered into. Credit was given while these negotiations were pending and a public notice was drawn as though this money had already been paid by the Imperial Irrigation District, and a seventy-five dollars charge was arrived at after eliminating the amounts of this prospective payment. The negotiations with the officers of the Imperial Irrigation District began some time prior to

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the issuance of the public notice—I think in the fall of 1916, was when they actively began. They sent representatives, including the President of the Water Users' Association and the attorney of the Irrigation District, I should say, to Washington for the purpose of negotiating such a contract; and negotiations were sufficiently advanced so that I felt sure they would go through and be signed, and I felt justified in giving the district of the Yuma project the benefit of that probability and possibility. The probability of the action at that time, in my mind, was somewhat similar to the probability of the ultimate payment by the Yuma Mesa of the portion of the works charged to that, and they are both doubtful. The pro rata cost of the dam extended over the project as it now exists, as I remember it. Any computations that I might have approved did not contemplate the irrigation of the Gila valley. Roughly speaking, there are now about one hundred and twenty thousand acres in the Yuma project. I do not remember accurately by memory where I got those figures; but I think the Yuma valley is about fifty-one thousand acres, the Indian Reservation on the California side—I mean the Bard unit, about sixteen thousand acres, if I remember rightly, and the balance on the Yuma Mesa. I don't know how much on the Yuma Mesa—that would make about fifty-three thousand on the Mesa, I believe. As I say, I cannot certify to the exact accuracy of those figures, but that is roughly. I cannot recollect whether or not the Secretary has restored all the

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lands on the mesa to the public domain except forty thousand acres—it may be that he has; but I think not. There is some private land up there, and he has not restored any of that; and then, it may be, that some of those figures, especially in the California unit, are incorrect, and [304] I have tried to quote from memory. We did set one hundred and twenty thousand as an outside limit of what could possibly be irrigated under the Yuma project, and it may be too large. I do not think that, in estimating the service of the dam we based it upon one hundred and thirty thousand acres, including the upper and lower Gila, or rather the north and south Gila. I have already testified about it. The estimate now handed me, and which was given the Water Users' Association by one of the officers of the Reclamation Service, I was not talking about. I was talking about the public notice.

Q. I am, too, because this, as we understand it, is what the public notice is based on; that is, the cost of the Laguna dam and head works is two million, one hundred thousand dollars in round numbers, and this cost prorated over the entire project of approximately one hundred and thirty thousand acres results in a diversion cost per acre of $16.60; and I am asking you if that must not in the nature of things include the north and south Gila?

A. No, I don't think so. It probably includes a larger acreage on the Mesa and possibly in California that I have stated. I have no doubt of that.

Q. But it is impossible, Mr. Davis. There are no

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other lands in California other than the Bard unit that you have described, sixteen thousand acres.

A. Oh, yes, there is. There is Indian lands.

Q. I am including the Indian lands.

A. You see the California lands is composed of two Classes of land, one is the lands that have been opened. They opened the public lands—

Q. 1910.

A. —under the act of Congress, and the other is diminished reserve. They are Indian lands that have not been opened to white settlement, and I am not able to state that area very accurately. I think the tendency—in fact, I know the tendency has been to estimate that liberally so that we would be sure not to charge too large an area, too large a quantity to the Yuma project as at present opened. It has been the aim from the first to keep entirely in the clear so that there could be no question regarding these charges.

Q. You don't seem to have been successful, Mr. Davis.

A. Well, that is the effort I have made all the time.

Witness resumes: The negotiations with the Imperial District began long before the early part of 1918 and before the issuance of the public notice. I do [305] not think they were continued quite as much as two years; but there had been a movement made in that connection for some time previous, and negotiations had proceeded to the point where there had been one or more drafts of the contract which had been tentatively, as I understood it, agreed upon by

(Testimony of Arthur P. Davis.)

the representatives of the district prior to the issuance of the public notice; and I looked far enough into the future to give the plaintiffs credit for one million, six hundred thousand dollars. I am of the opinion that the law does not permit any reduction of the cost of the Yuma project as fixed by the public notice because of the agreement by the Imperial Irrigation District to pay that one million, six hundred thousand dollars; but Congress might make a reduction. I do not think the oral promise of the Secretary of the Interior, to that effect, if made, are binding—not by any means; and he did not make any promise, as I understood it to that effect. As I started to explain, I think if the other parties, one Col. Fly and Senator Winsor were here, there would be no disagreement as to the fact which I will now relate, with the permission of the Court.

The COURT.—I have no objection, if they have not.

The WITNESS.—In this discussion in the Secretary's office concerning the contract some one of the Yuma representatives stated that they would receive credit for this, and I thought they would be misled if I remained silent, and I told them the facts that I have narrated in my testimony here, and they seemed surprised and took the matter up with me subsequently at a meeting away from the Secretary's office, and I told them on what I based my opinion, that the Supreme Court had decided very emphatically that the total investment must be repaid in accordance with the law, and that we had endeavored

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to meet that, and even though the Imperial Valley met all these payments it would not more than pay the cost of the project. And they seemed still more disturbed and brought the matter before the Secretary of the Interior in company with their representative Mr. Carl Hayden and Senator Smith. There were present at that conference also, besides the Yuma representatives, the president and attorney of the Imperial Irrigation District. I was present. And one of the Arizona representatives—I believe it was representative Hayden, but I will not be sure—laid the case before the Secretary from their point of view, and the Secretary asked me about it and I gave him the advice that I have here [306] expressed, that the law did not permit any reduction of the actual expense, and narrated as I have to you the process of arriving at the seventy-five dollars per acre. The Secretary agreed with that view, and very positively stated to Representative Hayden and to Senator Smith that in order to receive any credit upon that announced charge of seventy-five dollars per acre they would be required to obtain legislation, which they promised to endeavor to do. And that position was taken very emphatically by the Secretary of the Interior. He subsequently told in my hearing to Senator Winsor that he thought he could make the reduction, but that was in view of what had been said, the promise by the senator and the representative that they would endeavor to obtain such legislation—thought they could, that they ought to have it and all that and I take it that it was in view

(Testimony of Arthur P. Davis.)

of that prospect that he made his statement that he believed that he would be able to make the reduction. Subsequently a letter was drafted by Representative Hayden, as I understand it, announcing that such reduction would be made. The Secretary as far as I know, did not sign that letter and declined to execute the document. So that I think I am safe in saying that the Secretary has made no promise on the subject. He evidently, at the time he spoke expected to be able to make the reduction, but as I understood it, he previously more than once had stated that he had no legal right at that time to make the reduction and he has not up to date made the reduction. So I think both his statements concerning the law and his subsequent actions bear out that conclusion. At any rate, that is my opinion on the law.

There may have been subsequent conversation at the same meeting. The statement that I refer to in which he indicated the probability that he might be able to do this was made after the general meeting had broken up, and the people were standing prepared to go out; and I may not have heard all that he said. He may have said something that I did not hear. The case that I have referred to where the Supreme Court of the United States had emphatically decided that everything should be returned in the case of Swigart vs. Baker. The exact date at which the representatives of the Yuma project intervened in the negotiations between the Secretary and the Imperial Irrigation District, I do not remember. I remember there were present at numer

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ous conferences in my office—the office of the Assistant to the [307] Secretary Bradley, and in the office of Secretary Lane upon the subject, in the Winter, if I remember rightly, of 1917 and 1918; and they had previously had information. Previous to that a draft had gone to the Imperial Valley for discussion there and had been discussed in various ways, by telegram and otherwise, in the Yuma Valley. There were various features of it that Imperial people did not like and they came back for revision, about a year after, and some months after the first draft was sent down there.

In making estimates for great works such as the Yuma project, there is an allowance ordinarily made in large engineering projects for contingencies. Usually it is coupled with some other terms, sometimes it is "engineering and contingencies." Sometimes it is "Superintendence and contingencies," and sometimes it is a separate item. Generally there is something of that kind. The amount varies from ten percent to twenty-five percent, with the judgment of the engineers, and should be in many cases much greater than twenty-five percent in my judgment; but the contingencies that we have reference to need not necessarily, and I think very seldom in my experience and observation, relate to rise of prices. They seldom expect those things. Contingencies are physical surprises that may occur, "engineering and contingencies"—I do not recall what percentage was allowed in our estimates for the Yuma project. It is probably twenty percent. That amount was widely

(Testimony of Arthur P. Davis.)

in error as to what actually happened as to the rises in the cost of labor and material afterwards. It was too small for contingencies alone. [308]

Q. Now there has been a great deal of testimony in this case about the reclamation fund being a sacred fund and it being required to be revolved over and over, and that was the purpose of the law, etc. Can you explain why it wasn't revolved a little oftener in the Yuma project?

A. A revolving fund means a repayment, and one of the reasons for not getting a more prompt payment is this suit.

Q. Oh, yes, that is unquestionably true, but I am speaking of the long period that elapsed from the time the work begun under a contract that was to be, in effect, completed within two years. I am speaking now of the time that elapsed from, say, July the 31st, 1907, until April the 6th, 1917, before this suit was filed.

A. One of the causes was delay in the completion of the works. We did assess charges upon the Bard unit which was irrigated first, and we had little success in collecting there on account of the difficulties that they, that the settlers were up against and their lack of proper equipment and other obstacles. And then one other reason for the delay was the leniency with which the Government treated the people of the Yuma project in furnishing them water for six or seven years or a longer period at less than cost, without assessing the construction charges, to allow them to get on their feet, to clear and level their

(Testimony of Arthur P. Davis.)

land and put it in a productive shape, and otherwise put themselves in better position to pay the charges.

Q. But don't you know, Mr. Davis, that the delay in the finishing of the project was the very thing that prevented the land being cleared and leveled?

A. So far as related to the lands not irrigated, that is true, but that did not prevent the lands to which we could deliver water from being irrigated.

Witness resumes.—We took over and operated for a number of years two comparatively small canals as compared with the present works over the fifty thousand acres. I think those two small canals irrigated somewhere between one thousand and two [309] thousand acres. In the meantime, perhaps, some of the owners of the other forty-nine thousand acres were clamoring for water all the time. The delay after, say, sometime in about 1908 was due partly to the shortage of funds in the reclamation fund generally. We were short all around. Conditions recognized by congress in 1910 by the provision of an additional fund which we are now endeavoring to pay, that was one of the main causes. And others were—that delayed the commencement of the Yuma siphon. And other causes were that the great physical difficulties that were encountered in putting through the Yuma siphon, it took much longer to construct than was expected. We found various difficulties there, quicksand that you people at Yuma are well acquainted with, and those were battled constantly until they were all conquered and the siphon put through, and then we began irrigating

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the land as rapidly as we could and up to a certain point. But in giving these facts—I am merely endeavoring to relate facts; I am not endeavoring to interpret the motives of other people. I was not director of the service at that time nor Secretary of the Interior, and I have given the facts as I recall them. I can remember that the director concluded after we had irrigated a considerable acreage or were ready to irrigate a considerable acreage in the Yuma Valley, that not sufficient effort was being made by those having water available to place the land in cultivation, and he thought it was of doubtful wisdom to go very rapidly there when people were clamoring for water in other places where they were more active in preparing their land. It was a view I did not share, but it prevailed for a time. And later we gradually got more land under cultivation and delivered water to the entire valley and have been delivering water under that system for, I think this is the eighth year, under the gravity system. And previous to that we delivered under the old system for quite a while, after purchasing it, for several years. This is the seventh year. In 1912 we were able to deliver water to an area varying from seven thousand to twenty thousand acres. That [310] varied as we extended the system, as the work progressed. Of that eight thousand, one hundred were irrigated. In 1913 we were able to deliver water to thirty-four thousand acres, of which twelve thousand, four hundred was irrigated. In 1914, we were able to deliver to forty thousand of which seventeen

(Testimony of Arthur P. Davis.)

thousand, one hundred was irrigated. In 1915 to fifty thousand, two hundred, of which nineteen thousand two hundred was irrigated; in 1916 to fifty-one thousand, four hundred and forty acres, of which twenty-two thousand, one hundred was irrigated; in 1917 we were able to deliver water to fifty-two thousand acres, of which twenty-seven thousand, eight hundred was irrigated. That was the total area approximately of the Yuma Valley, and that area, of course, was not increased. We were able to deliver water to the entire area that year, nearly the entire area the previous year, and about less than half was irrigated that could be in 1916 and little over half in 1917, and thirty-five thousand, four hundred of the fifty-two thousand in 1918. I think it is being increased now.

Q. It was in the beginning of the period of years that you have just testified concerning that the director was disinclined to make any further improvements for the reason that the reclamation of the lands was not keeping up with the progress of the building of the canals to furnish water to them?

A. That was one reason. That was coupled with the extreme urgency of pushing the work in many other places with the funds that might be used.

Q. Now, the fact that the lands were not improved can be accounted for by the fact that the non-completion of the project for so many years had driven out the original settlers who would have been able to stay there and many of them did stay there for the two years or two years and a half that they expected to

(Testimony of Arthur P. Davis.)

have to wait for it under the promise, as we claim of Mr. Newell and Mr. Lippincott; that is, that it was to be done within two years from the time the work began.

A. I don't know as to that. I don't think any very [311] large number of people settled in the Yuma Valley under that impression. There may have been some, but I am not able to testify on that point.

Q. But, Mr. Davis, as the evidence shows here, or plats, the entire lower Yuma Valley was settled on May the 10th, 1904, with hardly any exception.

A. That does not agree with my impression. I know that there was some public land there that had not been opened until long after that.

Q. In the lower Yuma Valley? A. Yes.

Q. Mr. Davis, I will show you a plat.

A. It may be it had been filed upon, but there was public land which people from the Bard unit took up after abandoning theirs.

Mr. MOLLOY.—I was going to ask you, Mr. Davis, if it isn't a fact as disclosed by the plats that are in evidence, Plaintiffs' Exhibits 5 and 7, and others in evidence, in fact, if all of the lands or practically all of the lands in what you now call the Yuma project, that is, the lower Yuma Valley, were not settled upon on May the 10th, 1904.

A. I see nothing in that plat that shows any evidence of settlement.

Q. Well, at least, it shows evidence of entries, does it not?

(Testimony of Arthur P. Davis.)

A. It purports to. I am not able to testify as to that.

The WITNESS.—I did not testify positively that the land was settled upon or entered. I said there was some units that were available for the people who had abandoned their Bard filings to file upon. I could not say how many of those units the Bard people settled upon recently. [312]

And there were some units that were opened to entry, as I recall it, at the filing of the public notice in 1917. I believe they were. They were very much in demand, although the public notice had a seventy-five dollar charge in it. There was one of the units as I recall had one hundred and twenty-six applicants to file upon it, bearing this charge, and of the number that were filed upon, I believe fourteen or fifteen, I think none of them had less than fourteen or fifteen applicants, and the average number of applicants for those units was about fifty. So it was very much in demand. That is since the seventy-five dollar charge was announced.

Q. That was during the war and the land had an average market value of $300?

A. That illustrates the fact that the lands are in much demand. They have increased the value of the land, increased the value of the farmers' products, increased the number of people in the valley; and all this in spite of an announcement of the seventy-five dollar charge. It is the most prosperous and the most highly productive per acre project in the reclamation service. So far as I know, I don't know

(Testimony of Arthur P. Davis.)

of any private development that large that is as promising and is as prosperous as the Yuma Valley.

Q. And if the price of cotton should go back to six cents, what would the result be?

A. The result would be in one case that has been in testimony here, that one of the witnesses on your side and one of the litigants has rented his farm for ninety dollars per acre for three years with a seventy-five dollar charge that he has to pay for it. There is in three years fifteen dollars profit and the lessee pays the maintenance and operation charges in the meantime.

Q. Well, now, after the three years suppose that cotton is six cents.

A. He has already got fifteen dollars more than he is charged in three years.

Q. Now for that reason and because Mr. Bondesson happens to have a choice piece of land next to the town of Somerton, you think that all the rest of the people who own alkali land any other place ought to pay this seventy-five dollar charge also?

A. The lands that have been alkalied have been eliminated from charges until they are able to be cultivated.

Q. By what public notice was that accomplished?

A. I am not able to give the date, but that is our hope, and if it hasn't been completely done it will be done, I think. At least I will recommend it and the present indications are that the Secretary will approve it.

(Testimony of Arthur P. Davis.)

Q. Then as I understand it, this public is subject to revision?

A. That wouldn't be a revision of the public notice. That would be temporary relief from these charges due to the non-irrigability of the land.

Q. Isn't it a fact that in some projects—not many but some—public notices have been given and withdrawn, re-issuing them if not increasing them?

A. There was an act of Congress authorizing the withdrawal of public notices issued prior to that act, and I think it was exercised in two or three cases.

Q. Now, we are getting away from the question, and that is this: if the reclamation service had kept the promise that we thought was made to us in 1904 and completed the project in two years from the time work was begun, which would be approximately July 31st, 1907, if all the settlers who were there on May the 10th, 1904, would have been there or near there so that they could have come in and cleared up the lands and been ready to have the project paid for, the money would have been paid back to the reclamation service just about the time that you were finally issuing your public notice on April 6th, 1917, would it not?

A. That is a long drawn conjecture. I don't know what could have happened if things had been different, but the indications since indicate that we would be met by them attempting to escape these payments.

Q. But if you had completed it within the figure how could they pretend to try? [313]

A. Well, that is assuming an impossibility, a prac-

(Testimony of Arthur P. Davis.)

tical impossibility. We couldn't complete it within the figure because of the reasons I have narrated in my past testimony.

Q. But according to the letter of the Secretary of September 25th, 1917, you had completed one half of it for about one half of the estimated cost.

Mr. MORTON.—1917.

A. Well, as I have already testified to that—you mean the letter signed by Secretary Woodruff?

Mr. MORTON.—1907.

A. As I have already testified, that letter contained an error.

Mr. MORTON.—Q. That was misleading?

A. It was the result of a misunderstanding of the reports of the project manager in which he reported the thing on a certain basis and we understood them on another. I simply transmitted that information to the association. There was no conscious or intentional misrepresentation on the part of either, but it did contain an error, and so it cannot be quoted as a fact.

Q. Now what influenced the reclamation service in recommending the annulling of the J. G. White contract?

A. In recommending what?

Q. What caused the annulling of the J. G. White contract; that resulted from other contracts entered into by J. G. White & Company with the United States? I understood you to testify this morning that you were influenced by the fact that J. G. White & Company had other contracts with the United

(Testimony of Arthur P. Davis.)

State that they had to comply with.

A. No, I didn't intend so to testify, because I had nothing to do with the suspension of that contract as an administrative act. I was in Yuma at the time that contract was annulled and the work was, the annulment was accomplished in Washington, and I received telegraphic instructions what to do. So that I was not, although I am acquainted with the circumstances pretty well from subsequent examination of documents and conversations with officers of the service who were in touch with it, of course, I can't testify as to the influences that were in the minds of President Roosevelt and Secretary Hitchcock in taking that action.

Q. I understood you to testify that you made the investigations and made the recommendations.

A. No, I say the showing was made. This is my understanding: the showing was made by J. G. White & Company that their financial backers had utterly refused to advance them any more money for any purpose, that their solvency was threatened by the Laguna contract; it was a heavily losing contract to them; it could not be carried at anywhere near the estimated value or the bid prices, and if they made substantial further attempts to do so, would be financially ruined and were not a good risk, so that their financial backers refused to advance them more money; and I have no doubt that showing was correct and they were losing money.

Q. Well, now, how were a lot of settlers in the Yuma Valley who were afterwards financially

(Testimony of Arthur P. Davis.)

ruined by the delay, how were they interested in J. G. White & Company's financial difficulties? Why wasn't the penalty of a bond insisted upon?

The COURT.—This witness has said he doesn't know anything about the facts or why it was cancelled. He is just giving you a report of what he had heard.

Mr. MOLLOY.—Q. Now what were the other contracts you had reference to this morning?

A. Which other contracts, that J. G. White & Company had?

Q. Yes, as I understood you, you said it was to the interest of the United States to permit them to escape.

A. I couldn't specify the other contracts. I don't know the parties. I think they had some contracts with the United States, I have so heard. [314]

Q. Well, now, how would it have been to the prosperity of the project and looking towards its early completion if you had simply insisted upon the letter of the contract as you insist on doing with the water users now, and let J. G. White & Company fail and then enforce the penalty of the bond?

A. The circumstances that I touched on lightly this morning made it very improbable that anything could be recovered on the bond because of the conditions over which they had no control, physical conditions that were at variance with the expectations when they entered into the contract, and which they had a right to expect from the terms of the contract, one of which was the character of the rock. And the

(Testimony of Arthur P. Davis.)

United States did not unload by any means all of the risk concerning that dam when they entered into that contract with J. G. White & Company, and my experience with the efforts of the United States to enforce bonds under such circumstances convinces me that they would have little or no result except a long delay in the completion of the work due to pressure on the director if they do it and an expense in a lawsuit that would follow. I don't think we could have recovered anything from the bondsmen.

Q. Then I suppose another mistake had been made, another poor estimate.

A. Not another; the same one. I said the physical conditions were harder than we expected. I have testified that many times. And this is one of the principal physical conditions, that the rock there did not pan out the way the geologists thought it would. I talked with geologists on that very point. The rock was rotten on the outside and they said it was granite and in view of their experience in the past that after we had gone into it a distance we would get good hard rock; but that didn't prove to be the case.

Q. Would it have aided any to have sunk a few holes in it? A. Yes, sir.

Q. That would have been of assistance?

A. We sunk holes in it and that did aid some, but as I stated the other day it would have been much better if we had made our investigations more extensive. The principal thing we could have done would have been to open a quarry and quarried a few

(Testimony of Arthur P. Davis.)

thousand ton of rock. It would have been a very expensive form of investigation but that would have been wise. If we could have foreseen the conditions that have since developed we would have done that.

Q. Then the boring of test holes did not give you much information? A. How is that?

Q. The boring of test holes did not give you much information?

A. Well, they gave us the information as to where the rock was.

Q. That is all.

A. That was chiefly for foundation purposes, and that was the information that was developed by the borings.

The COURT.—I don't care to hear any more testimony as to the mistakes that were made by either side, or on any other question except the two questions as to whether or not this notice—evidence which will aid the court in determining whether this notice was such a notice, the notice of 1904 was such a notice as was contemplated by the law or whether the one of 1917 was the notice upon which the charges should be lawfully based, and the question of whether or not the project was completed. All other testimony, if you have any other, you may withhold it, because really those are the only two points that I think are material.

Mr. MORTON.—We will then introduce one or two documents in line with your suggestion, if your Honor please.

The COURT.—I feel that there is no way on

(Testimony of Arthur P. Davis.)

earth that I can correct any mistakes that have been made by either side, either a mistake that was fully understood, or a mistake in the estimates or a mistake in construction, or any other mistake, unless it is such a mistake as would avoid the payment of the sum estimated by the Secretary to be due. [315]

Whereupon the defendants introduced, without objection, a certified copy of the contract between the Secretary of the Interior and the Yuma County Water Users Association, of May 31, 1906, as Defendants' Exhibit 7.

Defendants' Exhibit 7 being annexed to and made a part of the amended complaint herein, as Exhibit C thereto, the same, in compliance with equity rule No. 75, is not incorporated here; but is transmitted to Circuit Court of Appeals by order of Court.

Thereupon the defendants introduced in evidence, without objection, as Defendants' Exhibit 8, a certified copy of the public notice of April 6, 1917, in words and figures following: [316]

**Defendants' Exhibit No. 8.**

PUBLIC NOTICE, APRIL 6, 1917.

1. In pursuance of section 4 of the reclamation act of June 17, 1902 (32 Stat., 388) and of acts amendatory thereof and supplemental thereto, and particularly the reclamation extension act of August 13, 1914 (38 Stat., 686), public notice for the second unit of the Yuma project, Arizona–California, is hereby issued, as follows:

2. LANDS FOR WHICH WATER WILL BE FURNISHED.—Upon proper water-right application being made therefor, water will be furnished under said project in the irrigation season of 1917 and thereafter, for the irrigable lands of the second unit, shown on the following farm-unit plats (excepting, however, all unentered public land), viz.:

Gila and Salt River base and meridian: T. 8 S. R. 23 W. T. 9 S., R. 23 W., T. 8 S., R. 24 W.; T. 9 S. R. 24 W.; T. 10 S. R. 24 W.; T. 11 S. R. 24 W.; T. 10 S. R. 25 W.: T. 11 S. R. 25 W.

SAN BERNARDINO meridian: T. 16 S. R. 21 E. T. 16 S., R. 22 E.

Approved by the Secretary of the Interior on January 15, 1917, and on file in the office of the project manager, United States Reclamation Service, Yuma, Ariz., and in the local land office at Phoenix, Ariz.

3. LIMIT OF AREA FOR WHICH WATER RIGHT MAY BE SECURED.—The limit of area per entry representing the acreage which, in the opinion of the Secretary of the Interior, may be reasonably required for the support of a family upon such lands is fixed at the amounts shown upon the plats for the several farm units. The maximum limit of area for which water-right application may be made for land in private ownership shall be 160 acres of irrigable land for each landowner.

4. APPLICATION FOR WATER RIGHTS.—All water-right applications must be made to the project manager, United States Reclamation Service,

Yuma, Ariz., upon forms provided for that purpose and may be made on or after the date of this notice.

5. CLASSES OF CHARGES FOR WATER RIGHTS.—The water-right charges are of two kinds, to wit: (a) A charge against each irrigable acre to cover the cost of construction of the irrigation system, called the construction charge; and (b) an annual charge against each irrigable acre to cover the cost of operation and maintenance of the system, called the operation and maintenance charge.

6. CONSTRUCTION CHARGE.—The construction charge for said unit shall be $75 per acre of irrigable land, payable as follows:

(a) For lands that were, prior to August 13, 1914, subjected by contract or otherwise to the provisions of the reclamation law, said construction charge shall be paid in 10 equal annual installments, the first of which shall be paid at the time of filing water right application and subsequent installments shall be due and payable December 1 of each year thereafter; provided, however, that if water-right application subject to the provisions of said reclamation extension act, or an acceptance of the provisions of said act, be filed within six months from the date of this notice said construction charge shall be payable in 20 installments, the first of which shall become due and payable on December 1 following the date of water-right application and subsequent installments on December 1 of each year thereafter; in which event the first 4 installments shall each be 2 per centum, the next 2 installments each 4 per

centum and the next 14 each 6 per centum of the total construction charge.

(b) For the remaining land an initial payment of 5 per centum of the construction charge shall be made at the time of filing water-right application and the remainder of the construction charge shall be paid in 15 annual installments, the first 5 of which shall each be 5 per cent and the remainder each 7 per cent of the total construction charge. The first of said 15 annual installments shall become due and payable December 1 of the fifth calendar year after the initial installment, and subsequent installments shall become due and payable on December 1 of each calendar year thereafter. [317]

7. INCREASED CONSTRUCTION CHARGE IN CERTAIN CASES.—In all cases where water-right application for lands in private ownership or for land under entries not subject to the reclamation law shall not be made within one year from the date of this notice, the construction charge for such lands shall be increased 5 per cent each year until such application is made and an initial installment is paid.

8. ADVANCE PAYMENT OF CONSTRUCTION CHARGE PERMISSIBLE.—Any water-right applicant or entryman may, if he so elects, pay the whole or any part of the construction charge owing by him within any shorter period than that provided by the public notices and orders applicable to his land.

9. OPERATION AND MAINTENANCE CHARGE.—For the year 1817, the operation and

maintenance charge under this notice shall apply only to the irrigable lands described in section 2 hereof not covered by valid water-rental contract at the date hereof; for the year 1918 and thereafter said charge shall apply to all of the irrigable lands described in section 2 of this notice. The minimum operation and maintenance charge for the year 1917 and thereafter until further notice, shall be $1.50 per irrigable acre, whether water is used thereon or not which will entitle the applicant to 2 acre-feet of water per irrigable acre. Additional quantities will be furnished for 75 cents per acre-foot. All such charges will be due and payable annually on March 1 following the irrigation season.

10. PLACE AND MANNER OF PAYMENT OF WATER CHARGES.—All water charges must be paid at the office of the Reclamation Service, Yuma, Ariz., in currency or by New York draft or money order payable to special fiscal agent, United States Reclamation Service.

11. EXCLUSION OF LANDS BY ACTION OF COLORADO RIVER.—Every water-right application shall contain the following provisions: The applicant hereby releases the United States from any and all claims for loss or damages on account of (1) the exclusion of said lands or any part thereof from the irrigable lands of said project, or (2) the failure to supply water for the irrigation of any part of the land hereinbefore described when such exclusion or failure is due to (a) the destruction by flood, erosion, encroachment, or other action of the Colorado River, of the levees erected by the Reclama-

tion Service along the banks of said river, or (b) a change in the location of said levees when such change is considered necessary by the proper officials of the United States to prevent the destruction of said levees from the said causes. Lands so excluded shall be relieved from payment of all installments of construction and of operation and maintenance charge which otherwise would thereafter become due from the lands so excluded.

12. TERMINATION OF WATER-RENTAL CONTRACTS.—All water-rental contracts for lands covered by this public notice, in effect on date of this notice, will remain in force until the end of the irrigation season of 1917, and notice is hereby given that all such contracts will terminate December 31, 1917. Water will be furnished after December 31, 1917, only to lands which water-right application has been made hereunder.

ALEXANDER T. VOGELSANG,

First Assistant Secretary of the Interior. [318]

Thereupon defendants introduced, without objection, as Defendants' Exhibit 9, certified copies of certain farm unit plats referred to in said public notice of April 6, 1917.

The farm unit plats constituting Defendants' Exhibit 9 having been, by the order of this Court, directed to be transmitted to the Circuit Court of Appeals for inspection by that court under its rules, the same are not incorporated here.

Thereupon defendants introduced, without objection, as Defendants' Exhibit 10, a public notice being supplementary to the Public Notice of Apr.

6, 1917, including a few tracts of land, and thereby including all of Tract C as described in the complaint and it being admitted by plaintiffs that all of Tract C was thus included as of Apr. 6, 1917. Defendants' Exhibit 10 is not incorporated here. [319]

Thereupon defendants introduced, without objection, certain farm unit plats referred to in the last mentioned public notice, as Defendants' Exhibit 11.

The farm unit plats, constituting Defendants' Exhibit 11, having been by order of this court direrested to be transmitted to the Circuit Court of Appeals, for inspection by that court under its rules, the same are not incorporated here.

Thereupon defendants introduced in evidence, without objection, two certain affidavits of the publication in two different local newspapers at Yuma, Arizona, of the public notice of April 6, 1917, as Defendants' Exhibits 12 and 13.

The plaintiffs stipulating and agreeing and not having denied or traversed that the public notice of April 6, 1917, was duly published, and said exhibits not being relevant or material to the questions at issue in this appeal, said Defendants' Exhibits 12 and 13 are not incorporated here.

Thereupon the defendants introduced in evidence, without objection, two affidavits of the public notice incorporated in Defendants' Exhibit 10, as Defendants' Exhibits 14 and 15.

Defendants' Exhibits 14 and 15 being substantially of like tenor and effect as Defendants' Ex-

hibits 13 and 14, and plaintiffs stipulating that the public notice incorporated in Defendants' Exhibit 10 was duly published, and said Exhibits 14 and 15 not being relevant or material to the issues on this appeal, they are not incorporated here.

Thereupon defendants introduced in evidence, without objection, a certified copy of the water right application required for lands in private ownership under the public notice, as Defendants' Exhibit 16.

Defendants' Exhibit 16 being annexed to plaintiffs' amended complaint, as Exhibit D thereto, the same is not incorporated here.

Thereupon defendants introduced in evidence, without objection, a certain map delineating the restored and withdrawn condition of the lands referred to in the testimony certified as of January 15, 1919, as Defendants' Exhibit [320] 17, for the purpose of illustrating defendants' testimony.

Defendants' Exhibit 17 having been by the order of this court directed to be transmitted to the Circuit Court of Appeals for inspection by that court under its rules, the same is not incorporated here.

Mr. MORTON.—We have, of course, witnesses who could give cumulative testimony on the two points that were made, but we deem it advisable, unless your Honor desires to hear them, to call only Mr. Lippincott.

The COURT.—I am of the opinion now that those declarations and statements that I admitted under rule 46 are not admissible. I admit them under Rule 46 in order that they might make their

record. Now if either side should appeal and the Circuit Court of Appeals should hold that those should have been admitted generally in evidence, then it would be time enough for you to introduce testimony in contradiction if you have any such testimony, but your objection having been sustained and it having been admitted under Rule 46, doesn't call for any testimony in contradiction thereof. So I think you might eliminate for the purposes of this suit all reference to what took place on May 28th, 1904.

Mr. MORTON.—That will be the ruling that your Honor has made now?

The COURT.—So that, as I have said, the two points that I am interested in are the argument on the legal proposition as to which of the two letters or written documents constitute notice of an estimate as specified in the law, and the one question of fact as to whether or not the project was completed within the meaning of the law. It seems to me it is only necessary for the purposes of this suit to introduce testimony on that one issue, unless you have some testimony on the proposition as to whether that notice was not such a notice as they claim it was. In other words, if there is any testimony which you desire to introduce which would enable the Court to more readily determine that legal [321] proposition I will hear that testimony. I cannot conceive of any.

Mr. MORTON.—I can't either.

The COURT.—So that about the only other point in the case, the only other question of fact is as

to whether or not the project is completed, and therefore I think I shall restrict your examination of your witnesses to that point.

Mr. KING.—I might say, if your Honor please, there are one or two statements that it was said that Mr. Lippincott made that we want the privilege of saying something on, in justice to him.

The COURT.—If there ever comes a time when it is necessary to introduce testimony on that question of fact Mr. Lippincott will be given an opportunity to be heard.

**Testimony of Joseph B. Lippincott, for Defendants.**

JOSEPH B. LIPPINCOTT, called as a witness on behalf of defendants, being first duly sworn, examined by Mr. Morton, testified as follows:

My name is Joseph B. Lippincott. I reside in Los Angeles, California. My profession is civil engineer. My training is such that I graduated from the University of Kansas in 1886, and I have been engaged largely in irrigation work in the west for the greater portion of the time since then. I was in the Reclamation Service from the time of the passage of the bill, Reclamation Act, in 1902 until the first of July, 1906. The following seven years I was chief engineer of the building of the Los Angeles aqueduct and since that time I have been engaged in general practice as a civil engineer. I am familiar with the district referred to in this suit as the Lower Colorado Irrigation District, being the north and south Gila valleys and the Yuma valley proper. My work and duties

(Testimony of Joseph B. Lippincott.)

as supervising engineer of the Reclamation Service included that section of the country. During the period from the passage of the Reclamation Act in 1902 until July, 1906, and for several years preceding the passage of the Reclamation Act, I had charge of the study of the available water supply in California, including the Colorado River, and we maintained [322] gaugings on the Colorado River at Yuma for some three or four years prior to the passage of the act. I have had a recent opportunity to view that country and to refresh my memory and to ascertain from maps and other data in the office of the Reclamation Service of the present conditions down there.

Q. Did you consider these matters with special reference to the practicability of the north and south Gila, the so-called north and south Gila valleys, or rather, their inclusion in the Yuma project?

The COURT.—Now, isn't that a matter for the determination of the Secretary of the Interior?

Mr. MORTON.—Yes, if your Honor please, but, of course, it is directly involved.

The COURT.—Hasn't he determined it?

Mr. MORTON.—I agree with you entirely, if your Honor please.

The COURT.—Well, then, why go into that question?

Mr. MORTON.—I don't desire to accept this as a part of the claim upon which the plaintiffs base their contention that the project is not completed.

(Testimony of Joseph B. Lippincott.)

It is merely in the way of explaining the action that the secretary would have the right to take, anyway, but, nevertheless, it is very urgently contended here that it should be done. I want to shorten it myself, but I would like to bring it out for that purpose.

Q. Will you answer the question?

The COURT.—I am wondering since I made the statement a few minutes ago whether or not the decision of the Secretary of the Interior as to the feasibility of the project or any portion thereof under the contract which was entered into between the secretary and the Water Users' Association is not final and whether or not his conclusions as stated in his notice that the project*ed* was completed is not final as a matter of law.

Mr. MORTON.—That is our contention, if your Honor please. We desire in a spirit of frankness and completeness to [323] show that his determination was based upon adequate facts, is all, and that was our only purpose in doing it. We entirely agree with the conclusion of the Court.

The COURT.—Supposing he wasn't justified?

Mr. MORTON.—It would be a moral question rather than a legal one.

Mr. KING.—Your Honor, the law as I take it is that so long as we have sufficient in the record to show that there was something there for the secretary to exercise his discretion upon, then the exercise of that discretion is final, and that is about all that this evidence goes to, so far as I can see,

(Testimony of Joseph B. Lippincott.)

is for the purpose of getting into the record sufficient facts showing that the secretary had some facts before him upon which to base his position as to which to exercise his discretion. The testimony of this witness will be practically corroborative of the testimony of the director.

The COURT.—In other words, that his action was not arbitrary and wholly without any evidence to support it.

Mr. KING.—Yes, that is the main purpose.

Mr. MORTON.—Now, will you repeat the question, Mr. Reporter? (Question read.)

A. Yes, sir.

Q. What was your conclusion as an engineer in that regard?

Mr. MOLLOY.—Now, we object to him giving his opinion at this time. It does not appear what investigations he has made, whether he has made sufficient investigations to base an opinion upon.

The COURT.—Do you wish to cross-examine him along that line?

Mr. MOLLOY.—Not at this moment, your Honor. It seems to me they haven't gone far enough to lay the foundation at this time to call forth the opinion of the witness.

Mr. MORTON.—He has testified that he was familiar [324] with the country. He was employed there for a number of years. He has gone back there and examined the records and books and has been on the ground. If you wish to cross-

(Testimony of Joseph B. Lippincott.)

examine him any further we would be very glad to have you do so.

The COURT.—He may answer.

Q. Mr. Lippincott, what is your opinion of the practicability of the inclusion of the north and south Gila into the Yuma project?

The COURT.—Based upon your knowledge of conditions there and your examination of the land in connection with the project?

A. I think the inclusion of the Gila Valley is a hazardous element in the project; not only hazardous to the lands in the Gila Valley themselves, but that it induces a hazard that hands over the lands in the Yuma valley proper in that the canal as originally planned to cross the Gila valley is subject to attack from the floods that we know occasionally occur in the Gila valley. At the time the plans were made it was considered a possible thing to cross that valley with a canal. But plans were developed subsequent to the time that I left the project which were subsequently adopted which in my judgment are an improvement over the original plans.

Witness Resumes.—I was over the Yuma valley during my recent visit. I was there also about two years ago. I regard the project as far as the Yuma valley is concerned as a completed project.

Cross-examination.

(By Mr. MOLLOY.)

I do not mean to say that the Yuma project is completed as originally planned by me and

(Testimony of Joseph B. Lippincott.)

others in 1904. It is not. I was over the ground two years ago. I was passing through Yuma in connection with other business and because of my general interest in the Yuma project I stopped over a day at Yuma and met Mr. Schlecht, the project engineer, and drove over the project in an automobile [325] with him. As I remember, we drove to the Laguna dam on the California side, and also drove through the Yuma Valley down through and somewhat beyond Somerton. That is all the driving and all the going over I did two years ago. Two years ago I did not see any part of the Gila portion of the project. I saw it on Tuesday of this week. I spent that day in Yuma, and spent a portion of the day in the Gila Valley, and the remaining portion of the time in the Yuma valley. I spent a portion of the afternoon in the Gila Valley, drove into the Gila Valley with a machine, and perhaps spent two or three hours on the south Gila, not the north Gila. I just drove up through the valley in an automobile, and drove back along the dusty roads. I did not pretend to take any levels. I do not know that that ride alone would permit of my arriving at a determination as to whether or not that portion of the project was feasible, but in addition to that I went over a number of maps with Mr. Schlecht and Mr. Davis since then. I have read a large portion of the report written by Mr. Sellew concerning the abandonment of the Gila Valley, and I have a very general knowledge of that whole country; in fact, quite a

(Testimony of Joseph B. Lippincott.)

detailed knowledge of it, and by means of these different lines of information I reached this conclusion. I mean the report of Mr. Sellew made to Mr. Hill, the supervising engineer, subsequent to the time that I left the project, relative to the change in the location of the main canals, particularly the abandonment of the crossing of the Gila River. I mean the change of plan that was adopted or that was estimated upon in the spring of 1904; that is, the plan was later changed by transferring the location of the main canal from the Arizona side of the Laguna dam to the California side, and bringing the main canal down on the California side to opposite Yuma, and then under the Colorado River in a siphon. It modified very substantially the plan to eventually cross the Gila with some sort of a siphon and bring a smaller canal down along somewheres in the south Gila Valley for the purpose of irrigating those lands. It was a report modifying the, or recommending the modification of [326] the plan upon which we estimated in 1904; perhaps nothing at all about abandonment. I cannot say certainly not. I cannot say as to that.

Q. Then why did you say you read a report from Mr. Sellew recommending the abandonment?

A. I said I read the greater portion of the reports.

Q. Of a report on the abandonment of the Gila portion of the project?

A. Well, if I made the statement—

(Testimony of Joseph B. Lippincott.)

Q. Gila crossing?

A. —in that form I would like to correct it. I say with the change in the plan from that adopted in 1904 as the basis of the estimate to the plan on the project as now constructed as far as the main canal is concerned.

Q. It was simply Mr. Sellew's opinion as evidenced by this report you speak of that it would be more practicable and probably cheaper to carry the larger canal down on the California side and cross under the Colorada River rather than to bring it down on the Arizona side and cross the Gila? That was the nature and extent of the report, was it not?

A. He took the position, as I remember—the report is here; I have it, and it would speak for itself better than my attempted quotation from it.

Q. Unfortunately it is not in evidence.

A. But the point I was impressed by is the hazard that he thought would occur, and which I think would occur, in attempting to build levees and a canal line across the valley of the Gila River.

Q. Well, about nine-tenths of that hazard, at least, was obviated by the change suggested by Mr. Sellew.

A. No, the hazard of the erecting of the levees in the Gila valley which were intended for the protection of the lands in the Gila valley would still remain and the hazard to the canal crossing would still remain. The hazard to the Yuma valley would [327] be removed.

(Testimony of Joseph B. Lippincott.)

Q. That is, the hazard that might result from having the entire supply of water for the lower Yuma valley come across the Gila? A. Yes, sir.

Witness Resumes.—I did not make any investigation on this trip to determine what it would cost, assuming the feasibility of it, to erect levees upon the Gila, but we did—at the time I was in the Reclamation Service we did build levees in the Gila valley and those levees in the Gila valley I think in part before I left Yuma were injured by Gila floods, and I know that those levees have been substantially injured by the floods of the Gila. I think I built them in the spring of 1905 or 1906. I left the service on the first of July, 1906. Prior to my leaving the service I think there was some wash of the levees, before I left in July, 1906. I cannot be certain about it, but I do remember of having seen fragments of the Gila levees either before I left the service or after I left the service. I did not see those levees the other day when I made the trip with Mr. Schlecht. I am not certain whether those erosions of the levees occurred prior to July, 1906, or subsequent, but I have seen the eroded levees on the Gila, and it is possible that it was prior to July 1906. Since then I have been back on the project once or twice. I cannot give the dates. I do not know. I really don't like to testify positively as to whether I went up to see the south Gila valley then. I don't recollect definitely. I know that I went up to the Laguna dam and saw the operation of the gates at the Laguna dam. To

(Testimony of Joseph B. Lippincott.)

the best of my recollection I visited the Laguna dam with Mr. Sellow on one occasion, and on another occasion when I was employed by the people of the Imperial Valley I was on the Yuma project and went over the possible route of the main canal from the Laguna dam down to the Hanlon Heading. So I have been I should say on the Yuma project four times since I left there. I could not say that I was in the south Gila valley until last Tuesday. The only point that I do remember is that [328] I have seen eroded levees in the Gila valley, but I cannot say when I saw them. There is a hydrograph that I have seen here showing the floods of the Gila and that would show whether there was a flood in the spring of 1906 or not. It is not in evidence.

Witness asked to see the hydrograph of the Gila River.

Mr. MOLLOY.—If the court please, while that is being looked for, do I understand your Honor's ruling awhile ago that you rejected our testimony as to what was said and done at the meeting of May 28th, 1904?

The COURT.—Yes, because there is no ambiguity in the contract entered into between the water association and the Secretary of the Interior, and all that took place before that time was merged into the contract.

Mr. MOLLOY.—That being the first announcement of such a ruling, of course, we desire at this time to except to the ruling.

The COURT.—Well, I think I said it might be

(Testimony of Joseph B. Lippincott.)

received under rule 46, but if I did not so state it may go in so as to give you the benefit of it if the necessity ever arises. You may note an exception.

Witness Resumes: (Holding hydrograph.) This is a hydrograph of the Colorado River at Yuma, Arizona, and also of the Gila River at Yuma, and it shows the floods on the Gila beginning in 1905 down to the year 1916. It shows that the Gila River had a flood in December, in November and December, 1905, and another flood in March, 1906. The flood on the Gila in December, 1905, according to this diagram was about ninety thousand cubic feet per second. This diagram has two lines upon it, one an unshaded line, which I understand to be the flow of the Colorado River, and one a solid line, a solid white line which I understand to be the flow of the Gila. This shows a large flood in the Gila in November and December, 1905, and it may be that that is the occasion that I have reference to. There was a very high flood in the Gila in January or February, 1905, and on Thanksgiving Day in 1905, there was a very high [329] flood, and during the spring and early summer there were several freshets, March and April, 1906. Also in 1905. No work had started. The contract for the Laguna dam was let, as I remember, about June 1905, and work began in July 1905. I am not certain about the dates when that construction work on the levees was undertaken on the Gila, but it was under way. They were building levees on the Gila at the time I left the service in July, 1906. The first work on the levees was done on the Colo-

(Testimony of Joseph B. Lippincott.)

rado River by Miller and Peasley under contract. There were floods in the Gila in November and December, 1905. There was a flood in March, 1906, and there was a flood about the first of April, 1906, on the Gila, and I think in March and April, 1906, we were doing work in the valley of the Gila. I might have seen some work that was washed out then.

Q. Now what you have stated is all you have to base your opinion upon that the Yuma Project is finished?

A. No, sir: no, sir.

Q. Well, what else?

A. By the Yuma project I mean the Yuma project as finally adopted by the Secretary of the Interior. The fact that the Yuma Valley is a going business, going farming community, the fact that the lands are highly improved, the fact that the whole unit shows the successful operations of farming in that valley, paved roads and good houses and fields under—

Mr. MOLLOY.—If your Honor please—

The WITNESS.—I am trying to explain a question, if your Honor please, that has been asked me.

Mr. MOLLOY.—It seems to me it is not responsive because he is stating some evidence of prosperity outside of the engineering field altogether. That has nothing to do with it.

The COURT.—I understand. If it contains matters which you think are not proper to be considered, you may cross-examine him about that after he has finished answering the question, but I cannot cut his answer off at this time. In other words, if he states

(Testimony of Joseph B. Lippincott.)

matters in giving his opinion which you think are not proper to be considered in enabling me to arrive at a decision, [330] you may test his opinion and his conclusions by cross-examination.

(Answer read as given.)

A. —fields under intensive cultivation, the fact that the farmers of this region are apparently able to successfully carry on farming operations under irrigation. In fact, the Yuma Valley presents to me one of the most prosperous and successful farming demonstrations that I have seen in this country. I would say as far as the cultivation of lands by irrigation in this Yuma Valley is concerned that the project was finished. There doubtless will be many things to do in the future. I doubt if the time will ever arrive—not arrive in my lifetime, when construction work is no longer necessary in the Yuma Valley, just as the time never seems to arrive when the construction work on these big transcontinental railroads has reached their final completion, and the project is a finished project in my judgment in that the land owners of that community are able very successfully to carry on the business for which that project was designed.

Mr. MOLLOY.—I move that the answer be stricken out, if the Court please, as not responsive.

The COURT.—Overruled.

Mr. MOLLOY.—We except.

Witness Resumes.—I saw a small area in the Yuma Valley that did not have these evidences of prosperity. I did not see any place that was yet ur-

(Testimony of Joseph B. Lippincott.)

cleared other than along a few of the ditch banks and property liens. I saw some sand hills. It was never contemplated that all the sand hills in the Yuma project, so far as I know, were to be leveled or removed. Certain areas were eliminated from the estimate, irrigable areas that I am familiar with. It would be true that it was contemplated that it was a little uncertain just how much of them would be included because of the uncertainty of just the exact height that the water level would be, and that more or less of them might be reclaimed by leveling, depending upon the height of the water on the particular lands on which the sand hills were; that is, [331] the canals or laterals leading water to a particular tract of land that had a good deal of sand hills on it, the level at which it came there would depend a great deal as to how many acres of sand hills could be leveled. It is also true that in certain of those tracts there were sloughs, and where the sand hills could be leveled into the sloughs, of course, greater areas of sand hills could be reclaimed than where the surrounding lands were level. Yes, indeed, I took into account the fact that Mr. Bondesson was able to rent his land for a high price. I was very much impressed with that; that helped to convince me that the project was finished, so far as he was concerned.

Q. But it did not put a single drop of water upon a single acre in the Gila Valley, did it?

A. No.

Q. And you really at this time have no facts or

(Testimony of Joseph B. Lippincott.)

information that would cause you to change the estimates made by your and the Secretary of the Interior in 1904, 1905 and 1906?

A. To change the estimate?

Q. Yes.

Mr. MORTON.—If your Honor please, this is along the line of material you have excluded. We have no objection to Mr. Lippincott answering it, but it is subject to your Honor's ruling.

The COURT.—You propose to show now the cause of the change in the estimate?

Mr. MOLLOY.—No, your Honor, not at all.

Mr. MORTON.—Do you want to make him your witness?

Mr. MOLLOY.—I am cross-examining him, as I take it, upon your Honor's suggestion, that it was necessary. They put this witness on to give expert testimony that the south Gila Valley was inadvisable, and that the Yuma project was finished. Now, I ask this witness if he is now in possession of any facts or information, and it is apparent that he is not, better or greater than he had at that time. Can I have the question read?

(Question read.)

A. Why, yes, I have additional information.

Q. That is, you have driven over the south Gila Valley [332] for an hour one way and an hour back the other way, and you have read Mr. Sellew's report that suggested the changing of the canal from the Arizona to the California side, and you

(Testimony of Joseph B. Lippincott.)

have seen evidence of prosperity in the lower Yuma Valley.

A. I have also reviewed maps showing among other tracts both the Colorado and the Gila Rivers, and I have discussed the question with the engineers who have been connected with the carrying on of the work since I left there.

Q. But that is hearsay. You had also maps to consult in 1904 and 1905 and 1906, and you had your own observation as to the meanderings of those rivers? A. Yes, sir.

Witness resumes.—I don't now definitely recollect when I ceased writing portions of the annual reports of the Reclamation Service. I don't know if I wrote a report on the Yuma project for the third annual report. I know I did write some of the annual reports, but I do not remember just what years. I certainly did not write any of them after I left the service in 1906. This (witness holding report) is the third annual report of the Reclamation Service, 1903–04, and under a heading entitled, "Yuma Project," my name appears, and, I presume, that I wrote that article. It is probably true, that all the opinions expressed in there, or the statements of fact, or whatever they are, concerning the crossing of the Gila, and everything concerned with the north and south portions of the Gila project were correct. Of course, these reports that are written from the field are subject to review in Washington, but I don't know of anything that is incorrect or inaccurate in that report. I do not

(Testimony of Joseph B. Lippincott.)

know if they were reviewed in Washington and became the action of the Secretary of the Interior in his report to Congress. The operations that I had charge of were every extensive in 1905 in connection with the Colorado River. They extended practically from the mouth of the Grand Canyon above Needles covering all the valleys and all the areas south thereof to the Mexican Line including the lands in the Imperial Valley. We devoted a great deal of time to the consideration of the possibility of diverting the water into the Imperial Valley, and [333] these preliminary investigations were really over a very extensive area conducted in a period some thirteen to sixteen years ago, and I simply do not pretend to remember all the data or all the statements that I made at that time.

Q. Well, do you remember writing that report?

A. Yes, I know.

Q. Or that portion of that report?

A. And I have no occasion to believe anything is inaccurate that is in there.

Witness resuming.—I don't remember the detail of the report on the same work in 1905 for the fourth annual report, but I presume that I wrote it. The year 1906 was the year in which I left the service, July 1, 1906. This report is for the calendar year 1906, and bears the date of the Government printing office, of 1907, so that I really would be uncertain as to whether I wrote that. Anyway these are the facts that in 1905 and during half

(Testimony of Joseph B. Lippincott.)

of 1906, I was engaged in actually putting into effect my estimates and recommendations of 1904. I still believed at that time that that portion of the Yuma project embraced in the north and south Gila Valleys was feasible and should be put through.

Q. And you have acquired no information concerning them, other than what you have detailed upon the stand, since that time?

A. Well, I would like—I would like to make a broad statement as to the conclusion you have drawn. I have been on terms of intimacy with the members of the Reclamation Service continuously, been interested always in the project and have discussed the Yuma project with these people on practically every occasion that I have had the opportunity of meeting them and talking to them about it. And I don't like to say that just this one visit on this date and looking over just this one set of plans and maps is the only consideration that I have given to that subject. [334]

Mr. MOLLOY.—Q. Well, now, you think you have absorbed some information from your constant touch with the reclamation officials during the years extending from 1906, until, say, 1917?

A. Intermittently, I have, yes, sir.

Q. Well, now, was there anything that you have received from any Reclamation Service official during that time that would lead you to believe that the Gila Valley portion of the project was to be abandoned, or should be abandoned?

A. Why, when my attention was called to the

(Testimony of Joseph B. Lippincott.)

proposed change in plan and I saw the change in plan for the main canal from the Laguna Dam to the Yuma Valley, I felt that that was an improvement.

Q. Yes, we think so, too.

A. On the project, as it was originally planned, and that certainly affects substantially the Gila project. Now, Mr. Davis, this morning brought out this feature, I believe, which is an engineering objection.

Q. But, if you will excuse me, Mr. Lippincott, that is information you received from Mr. Davis now.

A. Please let me —

The COURT.—Well, he is attempting to answer your question, referring to a fact testified to by Mr. Davis. I think that is proper.

A. And it is my opinion also, that a large canal may be carried on a light grade and the smaller canal has to be carried on a heavier grade. Now, with a large canal we could cover a greater area in the Gila Valley with gravity water than we could with a reduced sized canal, and I have been impressed with the fact that the area irrigable with gravity water on this reduced sized canal is substantially smaller than that which could be irrigated from a large canal.

Mr. MOLLOY.—Q. But, of course, that in itself would not render that portion of the project impracticable.

A. Perhaps not, but then another feature that

(Testimony of Joseph B. Lippincott.)

I believe is shown by one of your exhibits—I don't know that I can refer to it by number.

Q. One of our exhibits?

A. One of the defendants' try Exhibit 5.

Mr. MORTON.—Q. Is this it, Mr. Lippincott?

A. That is it. On Exhibit No. 5 of the Defendant, entitled "General Map of the Gila Valley," there is shown in yellow on this map the meanderings of the Colorado River in 1903; in red the position of the Colorado River in 1917, and this map—may I show your Honor?

The COURT.—Yes.

A. This map indicates that the Colorado River in 1917 had invaded the Gila Valley making an almost complete circuit, a circle of perhaps 300 degrees or arch around a substantial portion of the area in the Gila Valley that we contemplated irrigating in 1904.

Q. In the North Gila Valley?

A. Yes. And I think it would be very hazardous for an engineer to attempt to build a levee following the great meander of the Colorado River as it now exists.

Mr. MOLLOY.—Q. But, Mr. Lippincott, I will ask you if the project had been completed within two years after, say, June 30th, 1905, all those encroachments of the Colorado River could not have been made down through the north Gila lands if a substantial and proper levee had been built there?

A. It could not if the river could have been held by the levee, but, as has been evidenced, the holding

(Testimony of Joseph B. Lippincott.)

of the river with those levees is an exceedingly difficult thing, and has not always been successful.

Q. But you were quite sure in 1904 that it could have been held?

A. I am perfectly willing to admit that I recommended the effort should be made and the effort was made.

Q. Well, it is not sufficient for our purposes to have you admit [335] that you made the recommendation. We want to know if you made it in good faith. A. I certainly did, sir.

Q. And you believed that the river could be held, then?

A. Yes, I did. I believed, then, as I do now, that occasions will occur when the levee will be breached and injury will be caused, but by very vigorous protective work and the outlay of large amounts of money, it is possible to hold the river under all ordinary occasions. Now, in that connection, I would like to explain. It has been found necessary to lay a railroad track on top of those levees and maintain that railroad in a continuous condition so that it may be operated in case of emergency to maintain trains, including engines, steam shovels and rock quarries, constantly available at a moment's, or at a very short notice; the whole program to be pur into operation of loading the trains and dumping rock and fighting encroachments of the river when these incursions of floods occur. Now, manifestly that is a very expensive proposition. It has been one of the elements that

(Testimony of Joseph B. Lippincott.)

has added greatly to the cost of the project, and it is apparent, I think, to anyone that the number of miles of levees that have to be erected in that manner should be reduced, and I presume they have been reduced fifty per cent in eliminating that Gila Valley.

Q. Now you had also the former cuttings of the Colorado River, hadn't you, when you made your recommendations in 1904? A. Yes.

Q. Now, if there was a tendency on the part of the Colorado River to cut south through that township which is delineated on the map that you have just exhibited to the Court—

A. Yes, I know a good deal more about the Colorado River now, than I did then.

Q. Well, I thought you had expended a vast amount of time and a vast amount of money in getting exact information up to May 28th, 1904, is that right? A. We did.

Q. And anything that you have had since is just some general statements that have been made to you by Mr. Schlect or Mr. Davis? A. No.

The COURT.—You have been over that two or three times; I don't see any use in going over it again.

Q. Mr. MOLLOY.—Q. Now, during all these years you spoke of, when you—while you kept in touch with the Reclamation Service, as you say, do you know if there were repeated and numerous reports made to Congress by the Secretary of the Interior, indicating that the Gila portion of the Yuma project was feasible and including it within

(Testimony of Joseph B. Lippincott.)

it? A. No, I didn't know that.

Q. Did you know that the Army Board that was called in 1910 reported on the feasibility of that portion of the project?

A. I have heard so; I haven't read their report.

Q. I see in the fifteenth annual report of the Secretary of the Interior in reference to the Reclamation Service made to Congress under date of December the 4th, 1916, just a few months before this suit was begun, and a fewer months before the public notice of April 6th, 1917, was issued, the following statement about the Yuma project under the following heads, "Irrigable Area, Arizona, California, Yuma, setting forth the lands in Arizona, and the lands in California, and then giving the units, among which appears "Gila Valley, Arizona, 18,000 acres." Now, doesn't that indicate to your mind, Mr. Lippencott, as an engineer, that the Secretary of the Interior, acting on information furnished by the gentlemen who succeeded you still determined that the Gila portion of the Yuma project was feasible?

(Question read.)

Mr. MORTON.—I think, if your Honor please, that is an unnecessary difficulty to place the witness in. The report speaks for itself. He is asking for a conclusion about something that he cannot know. [336]

The COURT.—He is asking this witness to say whether or not the Secretary of the Interior still believed the area was irrigable. It doesn't make

(Testimony of Joseph B. Lippincott.)

any difference what this witness thinks about what the Secretary thought.

Mr. MOLLOY.—No, your Honor, I am attempting to show that this witness has been all along on the stand testifying about something which he didn't know anything about, and about which he didn't have sufficient information upon which to base an opinion.

The COURT.—I understand that you are asking now that he give his opinion as to whether or not the Secretary of the Interior still regarded it as irrigable. Now, he may state his knowledge. I don't see that his opinion as to whether or not the Secretary still deemed it feasible to irrigate certain lands is material.

Mr. MOLLOY.—Q. When you gave your opinion here, as given originally, Mr. Lippencott, you didn't have those reports before you, did you? When I speak of those reports, assuming that there are other reports than that.

A. I haven't read them recently, no, sir.

Mr. MOLLOY.—That is all.

Redirect Examination.

By Mr. MORTON:

Q. Just one moment, Mr. Lippincott, if you will just bear with me just one minute. You testified on cross-examination that the precarious character of the protection of the lands of the north and south Gila as they now exist, subject—or at least, as they now exist, and have been affected by the meander-

(Testimony of Joseph B. Lippincott.)

ings of the Gila and Colorado, is the thing that makes it inadvisable. Is that what I understood?

A. That is one of the things.

Q. Would it or would it not be under such conditions an assurance that those lands could be preserved intact without being subjected to these floods, even if a great expense were incurred in that regard, say six or ten hundred dollars an acre?

Mr. MOLLOY.—Now, I insist, your Honor, it has been demonstrated by the cross-examination that this witness is not possessed of sufficient information to enable him to answer the question as now asked.

The COURT.—I think the witness has fairly covered the point at issue.

Mr. MORTON.—That is all, Mr. Lippeneott, if the Court is satisfied with that.

The COURT.—He has stated his knowledge and what he bases his opinion upon, and that is all any witness can do. The value of it, of course, is a question for the Court.

Mr. MORTON.—Now, if your Honor please, it was our purpose to close here. Just simply for the record, there was an offer, if I remember rightly, filed by Mr. Molloy. Is that filed in the case?

Mr. MOLLOY.—No, it is writen in the record.

Mr. MORTON.—Was it read into the record?

Mr. MOLLOY.—I mean it was written into the stenographers' notes.

Mr. MORTON.—We do not seem to have any copy of that available. I thought possibly in an

abundance of precaution we might make a somewhat similar offer, a very brief one, and that is, that we offer to disprove the statement or the facts—

The COURT.—What is the use of offering to disprove them when they were not admitted?

Mr. KING.—I don't think it is necessary.

Mr. MORTON.—I don't believe so myself. I will be guided by judgment in that regard. The reason that I am asking for this information is that in the line of the recent ruling of the Court it [337] seems to me that possibly that offer is not a part of the record. Is it still a part?

The COURT.—He is entitled to offer the testimony at any time, any stage of the progress of the trial, and the offer was made in lieu of having the witness here on the stand to testify orally.

Mr. MORTON.—There is one point that we might offer to prove some testimony—offer some testimony upon, which, however, would be under the same ruling of your Honor that is it would be useless if this testimony is not admitted, and it goes to this point: that there are about twenty people down there who own nine thousand acres, that is, who are excess land holders on the 160 acres, and that the necessity or the requirement that they file a water right application under the public notice means that they would have to surrender all over 160 acres. It might be a point in the case of we should go on into the other region of the testimony that your Honor suggested, and it was only in that respect that I had it in mind. I am not going to put anybody on

the stand because it is just as the other testimony is; it is beyond and outside the case at this time. We would be prepared to show that if it should become material in any manner.

Inasmuch as this has been referred to so many times, it seems for the convenience of the Court and of counsel who will be looking at the record that this hydrograph of the Colorado and Gila Rivers might be in the record. Is there any objection to that, as illustrative—

Mr. MOLLOY.—Not if it is for the purpose of illustrating the testimony of the witness. And Mr. Morton, in that connection, there were two plats from which Mr. Davis testified yesterday, and you only offered one of them in evidence. One having been admitted, it seems only right that the other should be.

Mr. MORTON.—They were identical except in one instance Mr. Davis had put some penciled figures on to refresh his memory as to the distances or something of that kind.

Mr. MOLLOY.—I did not so understand from the way Mr. Davis testified. Perhaps you are right.

Now, your Honor, in connection with the statement that Mr. Morton has just made about the testimony of yesterday, your Honor will remember that we made these offers in response to a suggestion of your Honor that it would be offered and rejected, and that there would be an exception. Now, as a matter of fact, as I now remember the record, while they were offered your Honor never did make a

formal ruling on them, and I never made a formal exception.

The COURT.—If I did not rule on them, the ruling may be noted at this time and an exception may be noted.

Now, if there is no further testimony, when will you gentlemen, when will it suit you to commence your arguments?

Mr. MOLLOY.—We were going to put in some short rebuttal, if the Court please, but it will take more than the afternoon session.

The COURT.—Along what line?

Mr. MOLLOY.—We desire to rebut the testimony of Mr. Davis and Mr. Lippencott on the Gila. I think your Honor will save time by taking a recess. Some of it will be technical evidence. I am not an expert in that matter, and I think by giving us a chance to frame our questions distinctively and properly that we will save much time rather than to blunder around. [338]

The COURT.—Well, I am willing to do that, not only because it might save time, but because you request it.

Mr. KING.—If the Court please, I will say that we will be prepared to present our side of the argument at the close of the trial.

The COURT.—Very well. Now, while Mr. Davis is here, it might be well enough for us to anticipate what should be done, in the event that the Court should not find for the plaintiffs, in the matter of furnishing water to these plaintiffs during the pen-

dency of the appeal, and, if so, upon what terms.

Mr. MORTON.—I think I possibly might be able to make a suggestion, if the Court please, as I understand the situation.

The COURT.—The reason I mention that now, and not because I have made up my mind in the case, is I thought that Mr. Davis might contemplate leaving this afternoon or to-night. I do not know when I shall have an opportunity to take this case up and investigate the law of the case. I have never had occasion to do that and have not had time during the progress of the trial to do it. I am familiar, in a general way, with what the courts have decided on some of the points involved, but not as to what the courts have decided in other issues involved.

However, at this time, we will take a recess until to-morrow morning. [339]

Tucson, Arizona, May 2d, 1919, 9:30 A. M.

At this time court was duly convened, all parties being present.

AND THEREUPON, the plaintiff offered and introduced the following testimony in rebuttal:

**Testimony of Francis L. Sellew, for Plaintiffs' (In Rebuttal).**

FRANCIS L. SELLEW, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Francis L. Sellew. I reside at St. Johns, Arizona. I am a civil engineer. I am

(Testimony of Francis L. Sellew.)

now consulting engineer to the State Loan Board of Arizona, in the construction of the Lyman Dam on the Little Colorado River. I have had 30 years' experience as a civil engineer. Two years in general surveying, prior to 1890. From 1890 to 1903 with Metropolitan Sewerage Commission of Massassachusets, in various capacities from transit man to principal office assistant. From 1903 to 1906 I was general manager on contracting works constructing tunnels and dams. From the fall of 1906 till the last of May, 1915, I was in the Reclamation Service, having charge of the works at Yuma, Arizona. Since then I have been in general practice as a civil engineer, and as Project Manager of the Yuma Project. I became familiar with it. From the plat, Plaintiffs' Exhibit 26, the portion of the Yuma Project delineated thereon "Yuma Indian Reservation" contains fifteen or sixteen thousand acres. That is the portion of the project referred to by the witness Davis yesterday as the Bard Unit. All of that Bard Unit, as we designate it, was brought in while I was manager; and the charges fixed by public notice, I should say, in my opinion as a civil engineer, that the Yuma Project is not completed. I give that opinion on the following facts: I think the levee system is inefficient. In the treatment of such streams as the Colorado and Gila as they existed within the limits of the Yuma project, my theory is that nothing less than complete control of the streams should be effected. Anything else than that

will not be satisfactory. As an illustration of the control of a portion of the stream, take the reach extending west for several miles; here the river occupies a channel that is only six hundred to eight hundred feet in width and during the thirteen years with which I have been acquainted with it, there has been no serious, or any attempt on the part of the river to leave a practical regular course. Another illustration exists for several miles below the head works of the Imperial Canal. At this point the low water channel is fairly regular, the levees of the Reclamation Service on the Arizona side and those of the Development Company on the California side are from fifteen hundred to eighteen hundred feet apart. These levees have served to effectually control the flood. Other portions of the river between the Laguna Dam and the Mexican boundary have been leveed only on one side, and such levees are so far apart that they exercise little beneficial control on the channel conditions. Illustrative of what may be expected from a river which is only partially controlled, reference is made to the reach between Yuma and the Laguna Dam to the levee on the Colorado bank of this reach which is some thirteen miles in length and was completed, I believe, in 1908. It was built about on an average of a quarter of a mile from low water bank of the stream, a position which was assumed safe from river attack. In 1909 we had what I believe is the largest recorded summer flood in point of discharge that we have had on the Lower Colorado, the

(Testimony of Francis L. Sellew.)

big discharge was about one hundred and fifty thousand second feet. The elevations reached by this flood along this levee were substantially those that were anticipated when the work was designed. There was little indication of any destruction of the ground behind the levee. In fact the conditions were substantialy those that were anticipated from the proper levee control. The levee was not menaced in any manner that year by the flood. In 1912, there was another high flood, not quite as high as the one of 1909, I think. The discharge was one hundred and thirty-five or six thousand second feet, and notwithstanding this was less in volume than the one three years previous and reached substantially the same gauge height in Yuma. The height immediately below the Laguna Dam was about three feet greater and it approached dangerously near the tops of the levee at certain points along the upper portion of the Indian Reservation. The ground immediately behind the levee [340] was saturated, and, in several places, covered by several inches of water. The seepage condition of the portion of the Bard unit, which was under cultivation, and very serious, and considerable crop damage resulted. The super elevation of this flood was a great deal of a mystery to me until the following low water when a survey disclosed the fact that while the length of the river between Yuma and the dam had been about thirteen miles in 1909, it was approximately sixteen miles in 1912. The survey also showed that the river had preserved its

(Testimony of Francis L. Sellew.)

average uniform slope of about a foot and a tenth to the mile so that the super elevation at the dam corresponded to the increased length of the river. After an analysis of the conditions developed by this investigation, I was impressed with the fact that it was feasible to control this stream absolutely between levees a reasonable distance apart so that the low water and the high water channels would have practically identical access and I so recommended in the report to my superiors. No action was taken on this report, and in 1913 we went through another flood, which was not great, so far as discharge is concerned, but it menaced the levees at several points, and considerable rock revetment was necessary, and my opinion was strengthened that we should control this stream. And in the summer of 1913 I made another report on the matter. Following this report, I think it was in December, 1913, a consulting board was convened at Yuma to determine what should be done with the river, and after examining the data which has been collected, and investigating the conditions of the ground, they endorsed my position, and advised that the river be put in a straight-jacket between the Laguna Dam and Yuma. They laid down the principle that in controlling this reach and other reaches which are fixed at the ends as this was by the dam and the hills at Yuma, the operation should begin at the upper end and extend down the stream as far as the river occupied a position that was inharmonious with the estimated location laid down for it, and

(Testimony of Francis L. Sellew.)

they outlined the stretch that should be so treated and made a recommendation to that effect which was approved at Washington, and the work was inaugurated and substantially completed before the summer flood of 1914. The program involved three or four miles of levee construction on the Arizona side immediately below the dam and the building of two, possibly three, separate dikes of rock to contract the channel and force it to occupy its then existing position against the California levee. These works have withstood any flood ravages so far as I know that may have come since that time. The work also involved the raising of a mile or two of the California levee, which had been made necessary by the meanders of the stream.

Mr. MORTON.—I take this time to ask, is testimony of this character going in under Rule 46?

The COURT.—I didn't understand that there was an objection.

Mr. MORTON.—I would like to take the opportunity to object to all testimony of this kind, and move to strike out this particular answer on account of the fact it is not proper rebuttal. Of course, referring generally to the question of completion of levees has relation to the completion of the project.

The COURT.—This matter should have been introduced in chief because that was one of the allegations complained of that the project was not completed. But exercising a discretion in that regard in that matter I permitted them to introduce it at the present. It may go in subject to your objec-

(Testimony of Francis L. Sellew.)

tion, and, when I decide the case, I will indicate whether this line of testimony is sustained.

Mr. MORTON.—I think our testimony was introduced expressly under Rule 46.

A. (Continued.) After I left the service in 1915, I believe the policy in regard to river control was modified, and the scheme of leveeing the Arizona side was abandoned and since that time the efforts in that vicinity have been confined to the protection of the existing levee from the attacks of the river. I feel that it would not have been more expensive to thoroughly remove this [341] meance than it would be to protect against it. As a case in point, the lower Colorado in its relation to the Imperial Valley, this river got away from there in 1904 and 1905 and it has never been properly controlled, and, in my judgment, it will continue to do that until properly confined between levees protected by rock revetments. I think that outlines my reason for stating that in my judgment the project is not completed. The Board of which I spoke, consisted of General William M. Marshall, formerly of the United States Army, and at that time consulting engineer in the Interior Department; Mr. Louis C. Hill, supervising engineer of the southern district of the United States Reclamation Service, consisting of Arizona, New Mexico, and, I think, one Northern State, and myself. General Marshall was, and had been for several years, and I believe, still is, Consulting Engineer to the Secretary of the Interior.

I have a duplicate of that report. It is a carbon

(Testimony of Francis L. Sellew.)

copy. The signatures are original. I know the signature of General Marshall. I saw him sign it. And I know the signature of Louis C. Hill, supervising engineer. And this is my signature also. There is a blue-print annexed to the report that shows the work that it was proposed to do.

Mr. MOLLOY.—For the purpose of illustrating the testimony of the witness, we offer this report as Plaintiffs' Exhibit 33.

Mr. MORTON.—We object on the same general grounds, and also it is not rebuttal.

The COURT.—It may be received subject to your general objections.

Thereupon plaintiffs introduced in evidence, subject to the objection, their Exhibit 33, the report testified by the witness Sellew, with the exception of a certain blue-print map annexed thereto, in words and figures following: [342]

**Plaintiffs' Exhibit No. 33.**

Admitted and filed May 2, 1919.
Mose Drachman, Clerk.

DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE
Yuma, Ariz., December 16, 1913.

Board of Engineers to the Director, Washington, D. C.

Subject; Bank protection along Colorado River, Yuma Project.

1. The undersigned Board of Engineers have considered the question of bank protection along the

Colorado and Gila Rivers within the limits of the Yuma Project. The data examined is contained in two reports of the Project Engineer, one of December, 1912, entitled "The flood of 1912 on the Lower Colorado," and the report of July 31, 1913. In addition, maps showing the meanders of the stream on file in the Yuma office have been examined in detail. The board has made an inspection of the banks of the stream at various points and examined the protective works which have already been constructed. Attempts have been made to hold the banks by brush mattresses, fascines, permeable dikes, and the deflection of the current attempted by cuts across sandbars. The results accomplished by these methods of protection have shown that they are not permanent; their action is uncertain, and it is believed that further expenditures for such purposes are inadvisable.

2. On the levee between Yuma and Laguna Dam along the Indian Reservation, where a railroad exists on the levee top, some revetment has been accomplished in the last two years by dumping rock on the river side in such quantities that, as the river undercut, the rock dropped into position to protect the lower slope. Some 75,000 yards was placed in May and June of this year at various points along this portion of the work. This revetment has been examined and is believed to be efficient and sufficiently reasonable in cost to justify its extension to other parts of the work. It is furthermore believed by the board that no other method of protection will be permanent and safe. The interests of

the Project demand that the encroachments of the river be stopped, for if such protection is not assured the settlers on the bottom lands, they cannot be expected to take up these farm units and develop them. The cost of this revetment is estimated to be about $50,000 per mile of revetted bank. The total length of river front on the Project is approximately 75 miles, but it probably will not be necessary to protect all of this bank—at least not for many years in the future.

3. It is the opinion of the Board that the channel of the Colorado should be permanently fixed, with dimensions and location suitable to both high and low water, and that this can be done only by beginning at such points where there can be no changes in banks, and proceeding thence downstream fixing the stream within permanent limits and confining the flow to such channels as may be indicated by the river itself as most easily and naturally resulting from the work done in such order. Within the limits of the Yuma Project there are three such points where the river is or may be confined between permanently fixed banks; 1st, at Laguna Dam; 2nd, at Yuma bluffs; 3rd, at Pilot Knob, —at each of which points work could begin and be continued in the manner stated, and the three reaches co-ordinated in a complete system. We now recommend work in the first reach, below Laguna Dam. [343]

4. It is advisable to begin at the upper portion of the reach under consideration and work downstream a reasonable distance, then pause for obser-

vation of the effect of the work accomplished. To obtain the most economical results the work must be handled on a large scale with standard railroad equipment, the most modern air dump cars and spreader plows and large steam shovels operating in suitable quarries at Laguna Dam. The work which should be taken up immediately is as follows;

(1) About $50,000 should be made available for the protection of the levee along the Yuma Indian Reservation. This is a particularly critical point, as any breach in this embankment would result in the flooding of some 15,000 acres of bottoms on the Reservation, besides cutting off the main canal where it crosses the lower portion of this Reservation, and putting the entire works out of commission. This stretch of embankment should be held at all hazards. At Laguna Dam there is a steam shovel, a quarry is already developed, and trackage in position to continue the operations which were commenced a year ago. Probably the best method for operating on this portion of the work will be to rent a locomotive and operating crew from the Southern Pacific Company and other equipment from some contractor, as the work necessary for this year will very likely be accomplished within 60 to 90 days.

(2) Protection should also be immediately inaugurated on the Arizona side beginning at Laguna Dam and extending down-stream a distance of about 2½ miles, where it is proposed to build sufficient spur dikes of rock to hold the river against the bend it now occupies on the California side. (A

better idea of what is intended may be obtained from the accompanying map, the bend in question being marked "A.") In addition to building the spur dikes indicated, it will be advisable to lay a railroad track along the existing levee to its present end, in order that we may be in position to combat any rebound which may result from forcing the river against the California shore. The work on the Arizona side is isolated; that is, it has no direct connection with existing railroads, and the cost of getting the equipment into position will be considerable, so it seems inadvisable to rent it. It is believed that a locomotive, six dump cars, spreader plow, and such related equipment as is necessary should be purchased by the Government, moved to the site of the work, and retained there.

4. The money necessary to be expended during the next few months on the Arizona side is estimated as follows;

| | |
|---|---|
| Equipment, consisting of one 60-ton locomotive, twenty 16-yard air dump cars, and one spreader plow | $ 50,000 |
| Five miles of railroad track on the levee top, using 52-pound rail | 40,000 |
| Two miles of spur dikes and adjacent revetment | 100,000 |
| Total | $190,000 |

In addition, there should be provided $100,000 as an emergency fund for use at important points which may be attacked by the river. [344]

This makes a total of $340,000 which should be

(Testimony of Francis L. Sellew.)

made immediately available for river front protection.

It is the unanimous opinion of the Board that this money should be available at once, that the operations may be inaugurated in time to furnish protection against the coming flood.

WM. L. MARSHALL.
(Signed) LOUIS C. HALL.
FRANCIS L. SELLEW. [345]

The blue-print map attached to Plaintiffs' Exhibit 33, having been by the order of this court directed to be transmitted to the Circuit Court of Appeals, for inspection by that court under its rules, the same is not incorporated here.

Q. Mr. Sellew, could you take the map and explain to the court the nature and extent of the proposed scheme that you have just testified to?

A. Yes, sir.

The COURT.—I think I understand.

WITNESS.—I have said that this report was approved. I could not give the names of those who approved it. It was approved by the officials in Washington and the work ordered to be done, and the work was prosecuted in accordance with that report, I think substantially of the nature and to the extent indicated in the report and the plat annexed thereto. We carried out in a general way the work indicated. The work was a success so far as it went. My reason for saying the work was approved is that I believed there is a communication in the files of the office approving the report

(Testimony of Francis L. Sellew.)

and authorizing the carrying out of its provisions. I was furnished money to carry out the provisions of that report. I think about a year later another board considered the proposition, and there was practically an endorsement of the theory which the first report had laid down, but some further delay was recommended to allow the river more time to adjust itself to the location that we were selecting for it, and while that report was approved the instructions of the chief engineer were that we were to delay any further action outside of protecting what had already been put in until definitely authorized to proceed. During my incumbency as project manager I received no further authority. The second board, consisting of General Marshall, Mr. Hill, Mr. Henny, and Mr. Lang, who was then supervising engineer, and myself. General Marshall and Mr. Hill were the same two officers who made the first report just offered in evidence. Mr. Henny was consulting engineer for the [346] service, and Mr. Lang had succeeded Mr. Hill as supervising engineer. The scope of the work contemplated embraced the Gila as well as the Colorado. It would have been impractical to construct levees on the east bank of the Colorado River and not protect them from the ravages of the Gila coming in behind them. In due course, as we proceeded down stream, it would be necessary to confine the confluence of the two streams and then protect the Gila River from the convulsions to a point where it breaks through the delta, some seven or eight miles up the

(Testimony of Francis L. Sellew.)

valley. This matter of grasping the two rivers and placing them between two channels would affect the Bard unit, the fifteen or sixteen thousand acres lying northerly on the Colorado, in the state of California, in that it would control the length of the stream and thereby cause it to regain approximately its plane that existed prior to the lengthening it had gone through and this lowering of the plane would improve, I think, to a certain extent the seepage of the lands behind the levee. Then the rivers flowing in a regular channel there would be little tendency to erode. This would create a channel of far better hydraulic condition and less erosive action in all its margin. I understand that it is a fact as indicated by Mr. Davis in his testimony that certain Bard unit holders in the project were compelled to give up their holdings there and take other lands because of the seepage.

Q. Do you remember an act of Congress that was passed at the instance of the Reclamation Service for the benefit of just such unit holders?

Mr. MORTON.—We object to the question. The act would speak for itself.

Mr. MOLLOY.—Well, I don't think it is important.

The COURT.—This witness is introduced for the purpose of showing the project as laid out is not completed. And whether he or some other engineers thought dams should be built, and which policy was better, seems to me is not material now.

Mr. MOLLOY.—We propose to go further and

(Testimony of Francis L. Sellew.)

show, if it [347] becomes an issue in the case, that the project is feasible.

The COURT.—Now this witness who should have been introduced on direct examination is introduced in rebuttal to sustain an issue which you should have sustained on your direct examination as to whether or not the project was completed. That is one of your main contentions that the project was not completed. That is the burden you have. Now after the defendant has introduced testimony you bring witnesses to rebut matters that should have been brought out in chief, but I have permitted you to do that. However, I don't care to go into the question as to the difference of opinions of engineers on this project because I don't think any court can determine between the two which is right as to how the river should have been controlled. They don't agree themselves what means should have been employed.

WITNESS.—The river being permitted to run wild and lengthen its course it thereby raised up its bottom and caused the water to seep into the Bard unit. It aggravated the seepage condition. It certainly raised the flood line because every large flood since 1909 has been higher than that flood. It is my theory that by leveeing the river, if the levee is properly located, it would restore the Colorado River to its condition at the time of the completion of the construction of the Laguna Dam. I don't wish to be understood that the rise in the plane of this river is the sole cause of the seepage of the Bard

(Testimony of Francis L. Sellew.)

unit. A great deal of it was caused by excessive use of irrigating water, but I do maintain the rising plane has aggravated those conditions and if that can be restored to its former level those conditions would be mitigated to some extent.

Q. This plan that you have spoken of as recommended in this report, how nearly, if at all, does it follow the general plan as indicated on the plat, Plaintiffs' Exhibit 26, lying open before you?

The COURT.—You mean as the project was originally laid out? [348]

Mr. MOLLOY.—Yes, sir.

A. It would provide for the construction of the levee which is indicated on that plat.

The COURT.—Of a levee originally indicated according to plans, or how?

A. No, it would provide for a levee delineated there.

Q. Do you mean that was originally indicated on the plans of the project as originally contemplated?

A. As I understand it, yes.

The COURT.—Pardon me just a moment. If the levees were indicated on the original plans and maps what was the necessity of drawing a new map and indicating them on that?

A. This is a very general map and the levee recommended by the board was put on more in detail. The position of the river was changed since this general map was prepared and while the levee I said was a general one shown originally, its location is no doubt different. If that is a correct illus-

(Testimony of Francis L. Sellew.)

tration of what they propose to do, it indicates the leveeing of both sides of the Colorado and Gila.

Witness resumes, in response to further questions by the court.—It was not practical to build the levees in the exact location as originally indicated on the plat of the project for the reason that the river had changed its position, in some cases materially, probably a mile or more. It was not practical to build those levees as originally laid out and contemplated. It was necessary to make changes. The conference between myself and the other engineers at the time that map was drawn was December, 1913. I became connected with the project in October, 1906. I conceived the idea that the change should be made after the flood of 1912. My recommendation was made in the latter part of the summer of that year, as I recall it.

Witness resumes, in response to further questions by Mr. Molloy.—I cannot say how near the actual location of the levee on the southerly side of the Bard unit conforms with the [349] original plan as indicated on Plaintiffs' Exhibit 26, except that the entire front was protected. There were changes in the stream not shown there. It would be impossible to say without comparison of the maps of different dates. What I meant was that it was impossible for me to state definitely whether the location of the two levees was identical. Nobody can do that without the dates of the two maps and compare them because the meandering of the stream varies from year to year. In the location of that

(Testimony of Francis L. Sellew.)

levee in 1907 we picked out what seemed to be an economical location. By that I mean to say we picked out a reasonable land, the greatest area of land, having due reference to the probability of river attacks. Now we have leveed the entire front and we have placed the levee in what was supposed to be the best location in a general way so far as protecting the entire front of that particular unit. I cannot say how the present course of the river compares with that in 1904, but I know there has been marked changes at various points. The plan that I proposed would result in the complete enclosure of the stream between levees and that, as I understand the map in front of me, is what was contemplated at the time the map was made. It was the intention of the report made by Mr. Hill, General Marshall and myself to provide for turning the river back northerly to make it conform in a general way in its course to run parallel with the levee on the southerly side of the Bard unit.

Q. Where is Defendants' Exhibit—the map that Mr. Davis testified from yesterday, marked in red, the Defendant's Exhibit 5, from which Mr. Davis testified yesterday, or possibly the day before in the afternoon, indicating the Colorado river at certain dates, particularly in 1917, as to how it cut into fractional township 8 south, range 22 west and southerly towards the Colorado River to a great extent down into the south half of sections 17 and 18, and I ask you to state what effect by that cutting would your plan of 1913, recommended by yourself,

(Testimony of Francis L. Sellew.)

Mr. Hill and General Marshall, have on that cutting if it had [350] been prosecuted to a successful consummation?

A. The plan laid down in the board's report was to enclose the river down to a point where this occurred. It was then proposed that we pass to that point and allow this river to adjust itself to take such measures as were reasonable to throw it out of this bend; for as this bend lengthens it would in time assume a course that it could not maintain and during a high flood we might get a sufficient volume and the river would seek a shorter course. Of course in waiting we took a chance on another alternative that should the streams come together that would result in shortening the course several miles and nobody could predict what would happen. Our general plan was contemplated to take out that bend and confine the river over its entire course substantially parallel to the southerly side of the Bard unit. We were going to try and lead the river to these lines. My judgment was that the result would be beneficial, and in my judgment it was necessary in the control of the stream. It would have avoided the cutting down or incursions into the portions of sections 17 and 18 in township 8 south. I think that the lands in what is known in this case as the north and south Gila lands and sometimes specifically designated as Tracts A and B is as good land as in the project and as easily reclaimed as any land. I think the soil is good for agricultural purposes, perhaps some of it is better than others. The

(Testimony of Francis L. Sellew.)

vegetation is not as a matter of fact general as in the lower valley and the clearing and grubbing would be less probably than the average. As far as leveling is concerned, some of it is quite rough, but I presume the average conditions prevail except where there are some channels the river has occupied formerly. I think there are more sand hills in that unit than in Tract C below. If our levee plan of 1913, as recommended by myself, Mr. Hill and Mr. Marshall had been carried out, with the levees completed the only necessary work then for the reclamation of the tract would be the introduction of the distribution system and the [351] main canals to feed that system, and I should say under those conditions it was directly feasible of reclamation.

Cross-examination.

(By Mr. MORTON.)

I left the project in the end of May, 1915. The work that was stated in the report as a part of the program was completed, but the extension of the levee which was suggested in the report as occasion developed has not been done. This extension involved the control of the Gila to some extent. The report sets out and states that it refers to the Gila and Colorado Rivers. The report stated that the Colorado was fixed at three points, the Laguna dam, the hills of Yuma, and Pilot Knob. Those were the points the river had to pass; that between them it was subject to a meandering tendency and should be controlled within reasonable limits. They sug-

(Testimony of Francis L. Sellew.)

gested a well known principle in protecting any reach, and they first proposed to protect the reach between the dam and Yuma and then proceed down the stream then pause and note the effect. And when the river had resumed a position in compliance with our plans, then to go further, and so on until we had controlled the stream. Then they laid down a program as to what the first work should be. The rest of the program was not done. The report was approved and the principle laid down was approved in the second report a year later. We were not authorized to act in the doing of the work. I never understood it was disapproved.

Q. You were either authorized to act or not authorized to act?

A. But that had nothing to do with the approval of the work.

WITNESS.—The first report was approved. I mean the report that was transmitted to Washington. The authorities approved it and authorized us to proceed. Practically to go all through the work. As to the extra work I am talking about the policy was changed. [352]

Q. Then this was withdrawn?

A. No, you are wrong in that contention. The carrying out of our suggestions involved the opening of quarries on the Arizona side; the bringing in of steam shovels and laying railroad tracks on the levee which was entirely out of the appropriation with the work authorized at that particular time.

(Testimony of Francis L. Sellew.)

The report stated these preparations were necessary in order that this should be carried out, not immediately, but in the future and that portion of the plan was corrected there at considerable expense and then we went ahead and built the first portion and paused to note its effect on the river. Now, then, the fact that the work was approved and the plans contemplated sufficient to carry the work to completion as occasion demanded is sufficient evidence that the entire program had the approval of the officials.

(By the COURT.)

Q. What effect would that proposed change have had on the cost of the project?

A. It would have increased it.

Q. To what extent?

Why I think it would have been about in the neighborhood of thirty miles of levee including the two sides of the Gila. The levees, that is the earth portions I presume would have averaged, as the average of the Yuma levees do, about seven and a half to eight feet in height, ten feet top width, and a three to one slope. The excavation necessary would have been about probably ten yards to the foot. I think the earth portion would have been built for about thirteen thousand dollars a mile. The revetment—I think some portion would need no revetment, others a great deal.

Q. Of course I cannot tell by the description.

A. I should say that with the revetment necessary it would cost perhaps forty-three thousand

(Testimony of Francis L. Sellew.)

dollars a mile for the construction of the levee.

Q. For the thirty miles?

A. Yes, between twenty-five and thirty.

Q. Do you mean that would have been in addition to the original cost?

A. That had been exceeded before this time.

Q. I am asking you what effect the proposed changes would have had on the cost?

A. It would have increased it.

Q. And can you estimate the appropriate amount it would have increased it?

A. I think the cost of those levees would be in the neighborhood of one million and a quarter.

Q. Then the project as originally contemplated, was it or not feasible without that expenditure of one million and a quarter?

A. The project was not feasible without the construction of the levees.

Q. I mean if it had been contemplated without the expenditure of that amount even under your recommendations?

A. You couldn't have completed the levees without the expenditure of that amount.

Q. That additional amount? A. Yes.

(By Mr. MORTON.)

Q. As a matter of fact your board estimated the revetted levee at fifty thousand dollars a mile?

A. Yes, but you are taking the worst case. I stated it here that some of those levees would require no revetment, and some a great deal. In my judgment, the average amount would run perhaps

(Testimony of Francis L. Sellew.)

thirty thousand dollars a mile.

Q. You are changing your estimate?

A. No, I am simply qualifying your information.

Q. You still adhere to the fifty thousand dollars? A. In the worst cases. [353]

Q. The estimate, as I see it, is fifty thousand dollars for the river front?

A. That is the worst case.

Q. Now, the work that you did change, how much was that, that is, what proportion of the work did you actually do—did you do the work that was recommended in the report excepting the extension you referred to? A. Yes.

Q. Do you remember how much that was in round numbers in cost?

A. No, it was, including the assembling of the plat, several hundred thousand dollars.

Q. The doing of this other work was never over that? A. No, sir.

Q. Now, you said if that work had been done, you think the north and south Gila would be feasible? A. Yes, that is my impression.

Q. Do you mean to advocate it being done right now?

A. I advocate right now the control of the Colorado River between fixed levees from one end of the project to the other and I don't believe there will be any comfort of that stream until such is done.

Q. As a matter of fact, that is your opinion,

(Testimony of Francis L. Sellew.)

now, is it? A. Yes, sir, my opinion now.

Q. You know of course, that it is open to disagreement?

A. Oh, I know that difference of opinion makes a horse race.

Q. Yes. You are expressing your opinion and others might express it in different ways.

A. Absolutely.

Q. The Secretary of the Interior in considering both opinions might decide not to build the levees; you recognize that, don't you?

The COURT.—I think it is immaterial what the Secretary might decide.

Q. When you say the river is fixed at Pilot Knob, what do you mean?

A. That is a rock monument on the right bank of the stream which prevents the river from meandering in that direction and the Government levees on the opposite side hold the river in that position. It is not so definitely fixed as at the Laguna Dam nor the hills of Yuma, but it is one objective point the river must pass in its course to the sea.

(By the COURT.)

Q. As a matter of curiosity, not perhaps relevant, what, in your judgment, would be the cost of controlling the river within a radius of one end to the other?

A. This portion I have mentioned is about one million three hundred thousand dollars.

Q. Is that the distance you have referred to?

(Testimony of Francis L. Sellew.)

A. The thirty miles I have referred to. Now, below Yuma the levee has been completed on the Arizona side. The other control must occur on the California side. And where the California levee is substantially parallel and but a comparatively short distance from the Government levee, the control seems to be built up beyond a point where the Colorado broke through to the Salton sink in 1904 and 1905. The levee of the irrigation district swing away and the distance between them is in the neighborhood of perhaps three miles. And you might as well have no levee. In order to control that properly it would be necessary to put a levee close up to the bank.

Q. Do I understand that break through occurred within the thirty miles you have spoken of?

A. No, sir, but I understood your question to be from end to end of the project.

Q. Yes, you said from one end to the other, and I was wondering whether you meant to control it at the point where it broke through and went to the Salton Sea?

A. That particular break was not closed—that break was in Mexico. In the levees that I speak of here, the thirty miles, I [354] should assume the levee work on the original plat had been accomplished.

(By Mr. MORTON.)

Q. As a matter of fact, these plans that you have referred to here as having been originated by yourself and this board are entirely independent of

(Testimony of Francis L. Sellew.)

those early plans, taking into consideration the conditions as you found them?

A. Absolutely independent.

Q. And you were not following the early plans in following those? A. No, sir.

Q. And you made some recommendations accordingly? A. Yes, sir.

Q. If I mistake not, you testified awhile back to the control of some bends in the river above Yuma and said no man could tell which way it would go.

A. I meant that if that cutting of the Colorado River towards the south should continue far enough it would emerge into the Gila and shorten the course some three or four miles and that would throw considerable excess slope in the stream at that point, and velocity would increase and a great deal of cutting would occur. Under such conditions it is practically impossible to determine what position the stream is going to occupy or attack.

Q. Isn't that peculiarly true of the Gila River as a general proposition?

A. Oh, it is true of the Gila or any similar stream uncontrolled.

Q. That is your way of dealing with the precarious situation up there at the junction of the Colorado and Gila?

A. I would not say precarious except as you leave it alone. You can either control the stream absolutely or if you let it alone awhile you don't know what is going to happen. I would control

(Testimony of Francis L. Sellew.)

the situation the same as putting out a fire and not letting it burn.

Q. You advocate the expenditure of two or three more million dollars up there?

A. I would advocate the expenditure of this money I have stated a million, three hundred thousand dollars, because I believe the cost of maintenance of this will equal this sum.

Q. That estimation was made at what time; this million and a quarter?

A. I made it within a day or two.

Q. You mean this was not an estimate made by the board?

A. No, I am testifying as to my own opinion.

Q. Under present conditions is that the idea?

A. Yes.

Q. By the way you referred to doing a portion of the work then watching what happens?

A. I did.

Q. Did they do that way?

A. Yes, a portion of it.

Q. And then what happened?

A. Nothing more than to the others.

Q. As a matter of fact, what happened to that work done? A. Nothing.

Q. Do you know of your own knowledge that every bit of work done was a success?

A. I understand that it was.

Q. You would not know whether it had broken down?

A. I have not been along the levee itself since I

(Testimony of Francis L. Sellew.)

left it, but I understand the separate dikes are in substantially the same condition, and I should say the work was a success.

Q. Do you know of attempts to put the river through two cutoffs referred to in the report?

A. We attempted to cut between the bend. [355]

Q. Did you succeed?

A. No, we did not make a very strong attempt.

Q. What was the matter?

A. Lack of funds.

Q. Then in putting the river through the cutoff—what kind of funds were needed for that, maintenance and operation you mean?

A. It meant money to put in there to build some dikes and possibly a little trestle work. My theory was that the movement of this river towards the south should be stopped at all hazards because when it breaks through the conditions are going to be chaotic and I advocate the trestle across the mouth of that cut to relieve forever a chance of the river going through, and then allowing the river to silt the river up behind the levee. That was the only serious place in the control of the stream and my recommendation was that that should be taken up and fixed, but the board advised waiting until the river should put itself in a condition for control and that time never came. [356]

Redirect Examination.

(By Mr. MOLLOY.)

Witness Resumes.—I have mentioned about the economy of constructing works along the lines

(Testimony of Francis L. Sellew.)

of our plan as recommended by myself, Mr. Hill and General Marshall on account of the maintenance of the works already constructed by the Reclamation Service for the Yuma project. What I meant was to construct these levees properly. It would probably cost in the vicinity of a million, three hundred thousand dollars. I believe that the maintenance of the reclamation levee would run probably seventy or eighty thousand dollars a year and if you capitalize that you have a sum possibly greater than building those levees for control and relieve the maintenance charge. It is my judgment that this plan is as feasible now as it was then. It may cost a little more now, but I consider it is not only feasible but necessary. As the project is now constructed I feel it is cheaper to take this matter now in hand and correct it. This also includes the Gila River. As a general proposition this plan of ours does not diverge from the original plan as delineated on Plaintiffs' Exhibit 26. Of course the physical position of the embankment on the ground may diverge a great deal, due to the meanderings of the stream.

Q. If the river had been grasped hold of in a firm manner in 1905 when the first contract was let what, in your judgment, would have been the result, assuming that in 1905 there was no substantial change in the course of either river from what they were in 1904, as delineated upon Plaintiffs' Exhibit 26, the plat lying open before you?

(Testimony of Frank Sellew.)

A. I suppose it could have been done just as well then as now.

Q. Well, if such a plan as you have testified to was put into effect or begun to be put into effect in the summer of 1905 and prosecuted with reasonable diligence, could it have been completed according to the estimate of the reclamation fund to complete it?

A. I think it could have been completed just as well [357] as at the present.

Q. Would or not this cutting have been avoided?

A. That would have been avoided.

**Testimony of Mulford Winsor, for Plaintiffs.**

MULFORD WINSOR, called as a witness on behalf of the plaintiffs, being first duly sworn, examined by Mr. Molloy, testified as follows:

My name is Mulford Winsor. I reside at Yuma, Arizona. I am State Senator, and have been such for two terms. I was a member of the Board of Governors of the Yuma County Water Users' Association, and during that period I represented the association in Washington in the matter of the proposed contract between the Secretary of the Interior and the Imperial Irrigation District, in the spring of 1918. That was in relation to a certain contract that was eventually entered into between those two parties.

Q. What was said, if anything, or what promises were made, if any, by the Secretary of the Interior as to the disposition of the one million, six hundred

(Testimony of Mulford Winsor.)

thousand dollars, particularly as to whether or not the Yuma project should receive any credits, or the land owners receive any credits on the amount they would eventually have to pay on the land on account of the pro im speaydtemn - flw.oi itiiigowoa count of the promised payment of that sum of money by the Imperial Irrigation District?

Mr. MORTON.—Objected to as incompetent, irrelevant and immaterial on general grounds. This is pretty remote from the issues of the case.

The COURT.—Was this promise alleged to have been after the bringing of this suit?

Mr. MOLLOY.—Yes. And this is in the nature of a rebuttal of certain statements made by Mr. Davis. It is a matter to get in the record either directly or indirectly under Rule 46.

The COURT.—I cannot see that any promise alleged to have been made by the Secretary of the Interior after the bringing of the suit can affect the issue which the Court is called upon to decide here, that is as to whether or not the [358] project was completed, whether or not the notice of 1904 or the notice of 1917 should control. Objection sustained.

Mr. MOLLOY.—May we introduce it under Rule 46?

The COURT.—You may offer to prove that under the rule. You may ask the question and let the objection be made under Rule 46.

Q. You may state what was the nature and extent of the conversation, if any, between you and

(Testimony of Mulford Winsor.)

the Secretary of the Interior and what statements he made—in short you may state all that took place and was said between you as the representative of the Yuma County Water Users' Association and the Secretary of the Interior concerning the one million, six hundred thousand dollars which is promised to be paid in the agreement referred to by you between the Imperial Irrigation District and the United States in the use of the Laguna Dam for irrigation.

Mr. MORTON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained and he is permitted to answer under Rule 46.

A. The contract agreed upon provided that for the privilege of the Imperial Irrigation District connecting with the Laguna Dam, the district should pay the million, six hundred thousand dollars, which was satisfactory to the representatives of the Yuma Water Users' Association, conditioned upon the disposition of the million, six hundred thousand dollars. I asked the Secretary of the Interior if that would go to relieve the land owners under the Yuma project of a portion of the cost of the project and his decision was it would be the policy of the Department to so dispose of the million, six hundred thousand dollar appropriation on the same acreage as was used in determining the cost of the project. The date of that conversation was about the latter part of May, 1918.

Q. What, if anything, was stated by the Secre-

(Testimony of Mulford Winsor.)

tary of the Interior as to when or how that indicated arrangement would be put into effect? [359]

Mr. MORTON.—The same objection.

The COURT.—Objection sustained.

A. I asked the secretary if he were willing to give that assurance in writing and he stated he would. A statement to that effect was prepared and left with Congressman Carl Hayden for presentation to the Secretary of the Interior. The secretary in the meantime had left Washington on a Liberty Loan Drive and the statement was submitted to him by Congressman Hayden after I had left Washington, and according to the correspondence which I had was satisfactory to the secretary but for one reason or another it never was actually signed. The correspondence which I have would disclose my entire knowledge as to that feature of the matter.

Q. Was there any particular time indicated by the secretary as to when he might sign this writing you have spoken of?

A. He indicated he would do that as soon as he returned to Washington.

Q. Did that have anything to do with the time that the contract was to be actually executed by the Imperial Irrigation District?

A. No, there was nothing said as to that. The correspondence which I have in one particular states that the Secretary of the Interior told Mr. Hayden he was under the impression he had already signed this and sent the memorandum to me, but that

(Testimony of Mulford Winsor.)

hadn't actually occurred, and he said he would look it up at once.

Cross-examination.

(By Mr. MORTON.)

Q. This correspondence was between you and the Secretary of the Interior?

A. No, sir, the congressman.

Q. During any of those conversations did he tell Mr. Hayden that he would have to get an act of Congress passed in order to secure that credit?

A. Not at all. [360]

Q. Didn't the secretary tell Mr. Hayden so?

A. Not as a condition, but at the time the secretary made the statement that would be the disposition of the funds—that disposition had been objected to by Mr. Davis on the ground there was a deficit; it was his idea this million, six hundred thousand dollars should go to relieve that deficit. The secretary in making this promise, both Congressman Hayden and Senator Mark Smith were present, and he said, "Now, gentlemen, won't you help us to get an act to wipe out this deficit as shown on the books," and they both stated they would render such assistance as they could.

Mr. MOLLOY.—This closes the plaintiffs' case at this time and we should like permission to amend the complaint, I think it is section or paragraph 9, to more clearly conform to the proof as to the time in which the estimate and the determination of the charges were made. I should also like leave to file a supplementary pleading.

(Testimony of Mulford Winsor.)

Mr. MORTON.—Of course we would like to accommodate Mr. Molloy in reference to the first amendment he proposes, but as to making an entirely new issue upon another matter to the suit itself involving allegations of other matters or something of a similar nature, we believe this does not apply to this suit and object to the filing of the supplementary pleading.

The COURT.—I should not like to rule upon a proposed amendment until it is submitted. I am of the opinion now that any conversation which may have taken place between Mr. Winsor and the Secretary of the Interior cannot affect any of the issues in this case. I will permit you to prepare your proposed amendment and tender it and have a formal ruling.

Mr. MOLLOY.—We have determined not to offer any amendment but to only supplement the pleadings.

Mr. MORTON.—Object to the introduction of it at this time. It is irrelevant and immaterial to the matter he have in hand. [361]

The COURT.—It seems to me that the plaintiffs if correct in their contention can get the benefit of the matter set forth in the first paragraph of the supplementary complaint without any amendment whatever or without any supplementary pleading. In other words, if plaintiffs' contention that the public notice of 1904 was the notice provided for in the act of Congress, then no new notice issued subsequently could have any bearing what-

ever upon the status of the claimants and I cannot see it would make the case any stronger to set up the facts here pleaded. As to the second offer if well pleaded, I could not allow it for the reason that it is shown that plaintiffs knew all these facts before the commencement of this trial and for some time prior thereto, and that they were not taken by surprise, but on the contrary, tried the case on an entirely different theory, and because I think if testimony were offered to prove the matters set forth in the second paragraph of the supplementary complaint, the Court would be compelled to sustain an objection to it. Therefore the Court would deny permission to file a supplementary complaint.

Mr. MOLLOY.—We except from the ruling.

Mr. MOLLOY.—I was a little premature in announcing I would close. There is a letter of September 25th, 1917, in connection with the amount of expense for work done at that time spoken of by Mr. Davis in his testimony that I would like to offer.

Mr. MORTON.—Objected to on the usual grounds. It is involved in the same general controversy as the other matter is. It is incompetent, irrelevant and immaterial.

The COURT.—I will let you open this case for the purpose of offering any document which you may have overlooked. It may be admitted subject to objections.

Thereupon plaintiffs introduced, subject to the objection, letter of September 25, 1917, as follows: [362]

**Plaintiffs' Exhibit No. 34.**

DEPARTMENT OF THE INTERIOR.
WASHINGTON.

Sept. 25, 1907.

Mr. O. P. Bondesson, President,
Yuma County Water Users' Association,
Yuma, Arizona.

Dear Sir:

I am in receipt of your letter of September 16, making inquiries regarding the cost of the Yuma project.

The total expenditures upon the Yuma project, including preliminary surveys, up to August 31, 1907, are $1,730,002.68. On that date there were, of course, some unpaid bills for the month of August, and possibly for earlier dates; but these are not large in amount. The project as a whole was about one-half completed on that date.

The total amount paid to J. G. White and Company up to date is $564,857.86. This may be taken as approximately the cost of the dam up to date, as considerable equipment was purchased from J. G. White & Company, which will nearly offset the expenditures made on the dam other than those paid to White & Company.

Hoping this information will answer your purpose, I am

Your truly,
G. W. WOODRUFF, (Signed)
Acting Secretary. [363]

Mr. MOLLOY.—There is another matter I would like to ascertain from counsel on the other side. What is the total acreage now in the Yuma project? I understand there has been additions. Will there be any additions to the second project?

Mr. MORTON.—I am not prepared to say anything for any one in that regard.

Mr. MOLLOY.—I should like to have the information for the purpose of argument.

The COURT.—If there is anybody that knows you may call for the information.

**Testimony of William W. Schlecht, for Plaintiffs.**

WILLIAM W. SCHLECHT, called as witness on behalf of plaintiffs, being first duly sworn, examined by Mr. Molloy, testified as follows:

My name is William W. Schlecht. I am project manager of the Yuma project. The total gross acreage served by water in the Yuma project between our levees and the Mesa and the lower valley is about fifty-five thousand acres. Of that area there are certain sand hills areas, certain slough areas, certain rights of way; the major canals and drains which have been eliminated, and in addition an acreage eliminated which was damaged by seepage, leaving a net irrigable acreage of about between fifty thousand and fifty thousand, five hundred acres. The acreage which could have been supplied by water was there as of the time to which Mr. Davis testified, but since then we have used some area for rights of way, drains, and for other purposes. The total acreage under the Yuma pro-

ject in the second unit—the Yuma Valley unit, is approximately fifty thousand five hundred acres, between fifty thousand and fifty-one thousand acres.

Thereupon the plaintiffs rested their case.

Thereupon the defendants rested their case.

The above and foregoing contains all the testimony offered or introduced upon either side and all of the oral proceedings in the trial of the above-entitled cause. [364]

The COURT.—Let the record show the case taken under advisement. Plaintiffs given thirty days in which to file a brief. Defendants given thirty days thereafter to file and answer. Plaintiffs given fifteen days thereafter to file reply if they deem it advisable.

It is hereby stipulated and agreed between the parties hereto that the above, within and foregoing Statement of the Evidence in the foregoing entitled suit is true, complete and properly prepared; and we hereby request the Judge of said Court to approve and sign the same.

Dated July 31, 1920.

THOS. D. MOLLOY,
Solicitors for Plaintiffs.
THOS. A. FLYNN,
OLIVER P. MORTON,
Solicitors for Defendants.

In pursuance of the foregoing stipulation, I hereby find and determine that the foregoing Statement of the Evidence in the entitled suit is true, complete and properly prepared; and I hereby approve the same.

Dated August 25th, 1920.

WM. H. SAWTELLE,
Judge of Said Court.

[Endorsements]: Filed this 25th day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [365]

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In the United States District Court for the District of Arizona.

E. 74—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION, et al.,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Opinion.**

The trial of this case took place during the month of May, 1919, but the transcript of the testimony was not filed in the Clerk's office until October 24th, during a regular session of this court. Thereafter the Court was in continuous session until about Christmas. Hence, it was impossible for me to resume consideration of the case until about January first.

Plaintiff, Yuma County Water Users' Association, is a corporation duly organized and existing under the laws of the State of Arizona, with power, among other things, to enter into an agreement with

the proper officers of the United States of America with reference to the collection and payment of any and all charges made or levied under or by virtue of any law of the United States for the cost of providing water for irrigation of the lands of its shareholders and to comply with any such laws applicable in connection with the Yuma Project of the United States Reclamation Service for the irrigation of lands known as the Lower Colorado Irrigation District, in Yuma County, Arizona. [366]

The plaintiffs are share holders of said association and owners of land within said irrigation district. The defendants are the local officers and employees of the United States Reclamation Service.

Plaintiffs allege that the defendants demand that all share holders in said Association execute a contract whereby each and all of them shall agree to pay into the Reclamation Fund, in fifteen annual payments, the cost of said project, amounting to seventy-five dollars per acre and on a failure so to do, threaten to and will, unless restrained by order of this court, wrongfully shut off the supply of water from the lands of the plaintiffs and thereby cause each of them irreparable injury.

Upon the hearing of the application for a temporary injunction the parties entered into a stipulation, by the terms of which water has been furnished to said share holders during the pendency of this suit.

During the year 1902, the Secretary of the Interior, in pursuance of the provisions of an Act of Congress, known as the Reclamation Act, 32 Stat-

utes, 388, caused to be made the examinations and surveys of the irrigation district aforesaid, with the view of construction works for the diversion of the waters of said Colorado River and reclamation of the lands within said irrigation district. During the time said surveys and examinations were in progress said Yuma County Water Users' Association, at the suggestion of the Secretary of the Interior, was organized by the owners of lands within said irrigation district.

Section two of the Articles of Incorporation of said Yuma County Water Users' Association is as follows: "For the accomplishment, or to aid in and promote the accomplishment, of the aforesaid purposes or objects, or any of them, this Association shall have power to enter into any contract or other arrangement, [367] or undertake in whatsoever manner and by whatsoever means may be deemed proper or convenient therefor, to secure action by or the aid of the United States Government in the construction, erection or acquisition of any dams, reservoirs, canals, wells, or other works or property, or appurtenances necessary thereunto, for storage, development, diversion, distribution or delivery of water to lands of shareholders of this Association, or to aid therein, and to enter into any agreement with said Government which may be approved by the Secretary of the Interior or any duly authorized official or representative of the Government with reference to the collection and payment to the Government of any and all moneys which may be due the Government under or by reason of rights

issued by the Government to members of this Association for the use of water from any reservoir or irrigation works acquired or constructed by said Government, or in the acquisition or construction of which it may have aided, and to comply with any conditions, rules or regulations prescribed by Congress or by any executive department or official of said Government lawfully authorized thereunto, concerning the storage, diversion, delivery, application, or use of any water so stored, developed or delivered to the shareholders of this Association from or by means of any works constructed or acquired by the Government or in the construction or acquisition of which the Government may have aided, or which it may hereafter construct or acquire, or in the construction of acquisition of which it may hereafter aid."

On May 9th, 1904, Charles D. Walcott, Director of the United States Geological Survey, in a written communication to the Secretary of the Interior, stated that the report [368] of the supervising engineer, who had made said surveys and examinations, had been referred to a Board of Engineers and that "In general the reports indicated that by means of construction of a dam across the Colorado River and other works, it will be possible to reclaim upwards of eighty-five thousand acres of land at a cost of less than forty dollars per acre.

Much of this land, outside the Indian reservations is in private ownership and the feasibility of the project will depend largely upon the owners of the land uniting in a satisfactory form of organiza-

tion under the terms and condition of the Reclamation Law.

The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is believed that the cost of $40 per acre is not prohibitive.

There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending.

Recommendations.

In view of the present condition of knowledge of the project I respectfully recommend that the sum of $3,000,000 be set aside of the reclamation fund, for the construction of the Yuma project subject to the satisfactory adjustment of various matters pertaining to land and water titles and to structural features."

On May 10, 1904, the Secretary of the Interior [369] in his reply thereto stated: "In a letter of the 9th inst. to the Department you referred to the Act of April 21, 1904,—Public No. 125—which has authorized the Secretary of the Interior 'to divert the waters of the Colorado River and to reclaim, utilize and dispose of any lands in said reservations,' etc., and have referred to the surveys which have already been carried on under the Act of June

17, 1902,—32 Stat. 388,—and to the reports submitted by the engineers.

It appears that under the Yuma Project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of less than $40 per acre.

You have stated that much of this land, outside of the Indian Reservations, is in private ownership, and that the feasibility of the project will depend largely on the owners of the land uniting in a satisfactory form of organization under the terms and conditions of the reclamation law.

Your recommendation is that the sum of $3,000,000 be set aside from the reclamation fund for the construction of the Yuma Project, subject to the satisfactory adjustment of the various matters pertaining to land and water titles and to structural features.

In compliance with your recommendation I hereby set aside the sum of $3,000,000 or so much thereof as may be necessary, from the fund provided by the Act mentioned, for the construction of the Yuma Project, under the conditions you have set forth."

I.

THE COST OF THE PROJECT. As above stated, the owners of the lands organized under the terms and conditions of the reclamation law. It is claimed that this letter of the Secretary of the Interior purported to fix an estimate of cost and [370] determine the charge on the Yuma Project at less than forty dollars per acre and that the

United States is bound by such estimate and is prohibited from charging the land owners the actual cost of the construction of said works, although said actual cost has amounted to approximately seventy-five dollars per acre. On May 16th, 1904, the Secretary of the Interior and the chief engineer of the Reclamation Service, in a letter to the said Yuma County Water Users' Association, and in reply to a communication from said Association of May 3d, 1904, stated: "The Secretary reserves the right to make such reservations in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare."

It is clear to my mind that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands benefited and that such cost when collected should be paid into the reclamation fund to replenish such fund and thereby make irrigation at least a self-sustaining enterprise. In no other way could this purpose be accomplished and vast areas of arid and semi-arid fertile lands be reclaimed.

We cannot suppose that the estimated cost, based "on opinion and roughly made from imperfect data," such only as was available in laying out work on a large scale is all that the land owners can be required to pay regardless of the actual cost of the project. To place such a construction on the Reclamation Act would in effect nullify it and defeat its every purpose. I think that it was the pur-

pose of Congress to require the charges to be equitably apportioned with a view of returning to the reclamation fund the entire cost of construction thereof, and that the term "estimated cost" must be interpreted and construed in the light of the objects and purposes sought to be accomplished [371] and of the situation surrounding the proposed project during and at the time the preliminary examinations and surveys were being made. Any other construction, it seems to me, would necessarily bring about a cessation of all activity on the part of the Government, looking to the development and reclamation of the arid and semi-arid lands of the West. The act itself provides that all moneys received from the sale of public lands in certain of the Western states and territories are by the act "reserved, set apart and appropriated to a special fund in the treasury, to be known as the Reclamation Fund, to be used in examination and survey and the construction and maintenance of irrigation works for the storage, diversion and development of waters for the reclamation of arid and simi-arid lands in said states and territories." If the Government is bound by the preliminary estimates of cost of such irrigation projects and cannot charge the lands with the actual cost thereof, it can readily be seen that perhaps only one-half of the special fund would ever be returned to the treasury and sooner or later the Government would be compelled to abandon the work of reclaiming such lands in the Western states.

I think the estimated cost is the cost as officially

announced by the Secretary of the Interior on April 6th, 1917, and not the preliminary estimates made when the project was being considered.

If this fund could be utilized to pay the cost of the construction of the works and could be reimbursed to the extent only of the estimated cost as made by the engineers, then it can readily be seen how long the special fund would last and the impossibility of utilizing it in the construction of other projects. The entire fund would depend upon the accuracy of the reports and estimates of the engineers and no engineer could tell to a mathematical certainty what such projects would cost. [372] A mistake by the engineers in the estimate of the cost of one single project might absorb the entire reclamation fund.

This project has cost greatly in excess of the estimates made by the engineers but to those who have had any experience in the construction of works for diverting waters of running streams for irrigation, this is not surprising and when we take into consideration the results accomplished and the increase in the value of the lands under the project, as shown by the evidence in this case, it would seem that such expenditures were amply justified. It is easy enough to say, now that the project has been completed, that mistakes have been made or that the cost has been excessive, but history and experience has taught us that no really great undertaking of the character involved has ever been accomplished within the limits of the preliminary estimates of the cost.

In the case of Payett-Boise Water Users' Association vs. D. W. Cole, et al., officers of the Riverside Irrigation District project, decided July 21, 1919, the court said:

"The first and most sweeping contention of the Plaintiff is that upon July 2, 1917, the Secretary was wholly without power to establish rates, for the reason that the time had passed for taking such action, and further that the authority conferred by law, especially by section 4 above quoted, had been once exercised and was *functus officio.* It urges that under this section the cost is to be estimated and public notice of the apportionment thereof given before the construction of the works and settlement upon the land, and not after, and that it is the *estimated* rather than the *actual* cost which is to be returned to the reclamation fund.

Admittedly there was no formal compliance with this provision of the law in the present case, but it is the Plaintiff's contention that certain acts and statements done and made by the [373] Secretary of the Interior and representatives of the Reclamation Service are to be deemed to constitute a substantial, though informal, compliance; and further, as an alternative position, that it having been the duty of the Secretary to make and publish his estimate before commencing construction, he must now make the estimate as of such time, basing it upon information then available, and accordingly that the highest possible price which in reason he could establish would be $30,00 per acre. Neither view is thought to be tenable. The evidence wholly

fails to establish the claim that the statements and acts of the Government officials were intended or understood to be final or binding upon the Government. By an overwhelming preponderance of the circumstantial as well as the direct evidence, I am convinced that it was generally understood that the settlers would be required to pay the actual cost, whatever that might turn out to be. Without doubt in the beginning the belief prevailed that the cost would not exceed thirty dollars, and many it may be assumed relied without question upon the tentative estimates which were widely published in cultivating sentiment favorable to the undertaking. Neither have I any doubt that to many, if not most of the settlers, the announcement by the Secretary in 1917 of $80.00 per acre came as a great surprise. But we are concerned not with the hopes and disappointments of the parties, but with their mutual understandings, and it is impossible to explain the conduct of the plaintiff's officers and of the representatives of the Reclamation Service except upon the theory that all parties understood that ultimately the settlers would reimburse the Government for its actual and necessary outlay. The Arrowrock dam was not thought of until long after the project was undertaken, and of course its costs in no wise entered into the computation upon which the earliest estimates were based. It is inconceivable that the construction of this new feature [374] which was to add so much to the efficiency of the service would have been urged by the farmers or undertaken by the Reclamation Service at an esti-

mated cost approximately equal to that of the rest of the system but for the assumption that those for whose benefit the work was to be done would make reimbursement for the outlay. Both expressly and by implication the written agreement of February 13, 1906, between the plaintiff and the Secretary of the Interior, strongly militates against the plaintiff's contention. In short, from all the evidence I find that the understanding, in substance, was that the provision of the act requiring the estimate to be made before commencing construction work and before settlement, would be waived and that the settlers would pay the actual cost when and after that should be determined, instead of the estimated cost to be determined by the Secretary in advance. And no reasons are apparent why we should decline to give effect to such an understanding. True, the Secretary acts in a representative capacity and his duties are prescribed by statute. So both parties are bound by the law,—but only by the mandatory or substantive provisions thereof. Procedural directions intended for his benefit, the settler may waive, and in such waiver the Secretary may acquiesce, so long as the interests of the Government are not prejudiced. As already indicated, the basic principle of the law is that the settler shall pay the cost of what he gets, and reciprocally, shall get that for which he pays. Under the prescribed procedure this idea is not likely to be perfectly realized, especially in respect to any given project considered by itself. The actual cost will rarely, if ever, precisely correspond to the estimate. An approxima-

tion is all that can be expected. Hence, in agreeing to dispense with a preliminary estimate, and to await the disclosure of and abide by the actual cost, the parties, while deviating from the law in a matter of procedure, were taking [375] a course by which they would more perfectly work out its purpose. They will therefore be held to the agreement express and implied, relying upon which the Government upon the one hand built the system, and the settlers upon the other entered, reclaimed and improved their lands. The settlers must pay the actual cost; but only the actual cost. Emphasis is appropriately laid upon this proposition, for the reason that while not openly repudiating the written contract or controverting facts implying such an understanding as it evidences, and while for certain purposes invoking both the written contract and the implied understanding, both parties have consciously or unconsciously at times assumed, that their rights are in the main such as they would have been had there been no agreement and had the statutory procedure been strictly followed."

In the case of Swigart vs. Baker, 229 U. S. 187, the Supreme Court of the United States said "The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits————The official reports show that, in 1902, there were in sixteen states and territories 535, 486, 731 acres of public land still held by the government and subject to entry. A large part of this land was arid, and it was estimated that 35,-000,000 acres could be profitably reclaimed by the

construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise; or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works,—the [376] cost of each project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the trust, it was again to be used for the construction of other works."

II.

THE PUBLIC NOTICE.—Plaintiffs contend that the Secretary of the Interior made an estimate of the cost on May 10, 1904; that the circulation among the land owners on May 10th, 1904; and thereafter, of a certain pamphlet containing letters, reports and estimates, some of which have heretofore been referred to and herein set forth, constitute a public notice within the meaning of the Reclamation Act. With this contention I cannot agree. I think the public notice was the one given on April 6th, 1917.

III.

THE CONTRACT OF MAY 31ST, 1906.—The Board of Engineers in their letter of April 8, 1904, to the Chief Engineer of the Reclamation Service approved of the general plans submitted and expressed

the opinion that the owners of the land should execute liens on their lands "for the return of the cost of reclamation." Between the date of this letter of April 8, 1903, and the execution of the contract hereinafter referred to, there were numerous communications between said association and the officers of the Reclamation Service. The said communications, as well as the testimony of the witnesses who were summoned at the trial, detailing what transpired at the certain meetings which were held preliminary to the execution of said contract have been admitted and carefully considered. No doubt the officers of the Reclamation Service, as well as the land owners, believed that the estimate as to the probable cost of the construction of the works was ample. However, the land owners, after due [377] consideration of all the facts and circumstances and conditions as they then existed and after advice of able counsel of their own selection, without fraud or deception on the part of any representative of the Reclamation Service, freely and voluntarily entered into and executed the contract of May 31, 1906, and therefore are bound by all of its terms and provisions. Incidentally, it may be said that while the cost of construction was much greater than was anticipated, the lands have been greatly benefited and the testimony shows that annual net revenue per acre is almost equivalent to the cost per acre of the project. No claim is made, nor can be made, that the land owners were ignorant or that they were unacquainted with business methods or contractual obligations. It must be assumed, therefore, that they read or heard

read the contract of May 31st, 1906, and fully understood its every provision. If they did not their own counsel were there to advise them and it can hardly be claimed in a court of equity that they should not be required to abide by the consequences of their voluntary act. The terms of the contract are, in my judgment, clear and understandable, and must be held to express the intention of the parties and to be binding upon them in every particular. In terms which are perfectly plain and positive the contract provides:

4. "That the payments for the water rights to be issued to the shareholders of said Association, under the provisions of said act of Congress, shall be divided into not less than ten equal annual payments, the first whereof shall be payable at the time of the completion of said proposed works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the Association.

The cost per acre shall be equal throughout the entire district now proposed to be irrigated thereby, which said [378] district is hereby defined as comprising the lands described and bounded in section 3 of article IV of the Articles of Incorporation of said Association and also the lands described and bounded in article IV of Amendments of the said Articles of Incorporation of said Association.

5. The said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the *cost of the irrigation*

*works* which shall be apportioned by the Secretary of the Interior to its shareholders, and promptly pay the sums collected by it to the Receiver of the local land office for the district in which such lands are situate; that it will promptly employ the means provided and authorized by the said articles of incorporation for the enforcement of such collections, and will not change, alter or amend its articles of incorporation in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessment contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior."

It is shown by the testimony of the Secretary of the Association and admitted by counsel for plaintiffs that this identical contract, with the quoted provision, was submitted to a vote of the constituent water users and land owners in the year 1904 and was by them accepted and was by said Association on their behalf executed on said 31st day of May, 1906.

IV.

HAVE THE PROPOSED WORKS BEEN COMPLETED.—Plaintiffs insist that the "proposed works" as originally conceived, have not been completed; that the Reclamation Service has no legal [379] right to change or modify the same and that the shareholders cannot be called upon to pay the cost of construction until the same have been completed according to the original plans. Plaintiffs counsel assert in their brief that if the works should wash out it would be the shareholders' own loss, for

getting, of course, that in such event the Government might lose its entire security and forgetting also the reservation contained in the letter of the Secretary of the Interior, dated May 16, 1904, to the effect that "The Secretary reserves the right to make such reservations in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare."

From a practical standpoint I think this project was completed April 6, 1917.

Judgment will be rendered for the defendant and counsel will prepare and submit a decree in accordance with this opinion.

[Endorsement]: Filed Oct. 4, 1920, C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [380]

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In the United States District Court for the District of Arizona.

No. E. 74—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Final Decree.**

This cause came on regularly to be heard in open court on the 28th day of April, 1919, at the regular November 1918 term of said Court, and was heard

on the said 28th day of April, 1919, and continuously from day to day thereafter to and including the 3d day of May, 1919, upon the amended complaint of the above-named plaintiffs and the answer thereto of the above-named defendants, and the Court having heard all the evidence and proofs produced herein and the argument of counsel thereon, and having duly considered the same, and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said amended complaint and this suit be and the same are hereby dismissed and held for naught, and that the said defendants have and recover of plaintiffs their costs in this behalf sustained.

Done in open court this 26th day of February, 1920.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. E.-74—Tucson, Yuma Co. Water Users' Assn. et al Plaintiffs, vs. W. W. Schlecht and David C. Caylor, Defendants. Filed February 26, 1920. C. R. McFall, Clerk, by J. Lee Baker, Chief Deputy. [381]

In the United States District Court for the District of Arizona.

No. E. 74—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Supersedeas Order.**

WHEREAS, the above-named plaintiffs have given notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 26th day of February, A. D., 1920, and desire that during said appeal the aforesaid final decree shall be superseded in part so as to preserve as near as may be the status heretofore existing herein whereby the constituent members and stockholders of the plaintiff Yuma County Water Users' Association, a corporation, owning lands within the Second Unit (Yuma Valley Unit) of the Yuma Project of the United States Reclamation Service may obtain irrigation water for their lands during the pendency of such appeal;

IT IS HEREBY ORDERED, as a condition to the superseding as aforesaid of said final decree, and the preservation as near as may be of the aforesaid status:

(a) That the plaintiffs proceed with such dili-

gence as to perfect their said appeal so that the same may be called for hearing at the May Session of the United States Circuit Court of Appeals, to be held in the City of San Francisco, State of California, in the month of May, 1920;

(b) That the said constituent members and land owners who have not heretofore executed and filed water right application under the terms and conditions of the public notice issued for the aforesaid unit of the Yuma Project under date of April 6th, 1917, shall, on or before the fifteenth day of April, A. D., 1920 [382] properly execute and deliver to the defendants a water right application as required by the said public notice of April 6th, 1917, and on the forms provided for such purpose by the Secretary of the Interior of the United States, said applications to be modified, however, (1) by striking therefrom all of Article 8 thereof, being that certain article granting unto the United States of America rights-of-way, and (2) by the addition thereto of a new article or clause providing in substance that the execution and delivery to the defendants of such applications shall be without prejudice to the rights of the applicant to have the amount of the construction charge as in said applications stated redetermined and reassessed in such other and different amount as may be determined upon as just, proper and equitable by the order of the United States Circuit Court of Appeals for the Ninth Circuit upon the hearing of and decision on the appeal of the plaintiffs herein; or, in the event a further appeal be taken to the United States Supreme Court, the amount deter-

mined upon as just, proper and equitable by the order or mandate of that tribunal;

(c) That at the time of the execution and delivery to the defendants the aforesaid water right applications, each and every applicant shall pay into the Reclamation Fund, in addition to the customary charge covering the preparation and cost of recordation of the applications in the public records of Yuma County, Arizona, (1) the amount then due under such applications, computed on a construction charge of $40.00 per acre, commencing with the instalment of the construction charge due December first, 1917, where the provisions of Section 2 of the Reclamation Extension Act of August 13, 1914 (38 Stat., 686), may be applicable, or commencing at the date of temporary application for a supply of irrigation water under the terms and conditions of the stipulation of the parties herein, in instances where Section 1 of the aforesaid Reclamation Extension Act is applicable, plus the penalties prescribed by said act; (2) the [383] difference between the amount or amounts heretofore paid under the terms and conditions of the formal stipulation aforesaid of the parties herein on account of operation and maintenance, and the amounts payable under the public notice of April 6th, 1917, as amended by public notice of March 24th, 1919; (3) thereafter and during the pendency of and until the decision of the Circuit Court of Appeals aforesaid, each said applicant shall continue to pay on December first of each year the annual installments of the construction charge, if any, computed on a charge of $40.00 per acre and in the event

said plaintiffs shall fail to make good their plea on appeal to the said Court of Appeals then and in that event such applicants shall within a period of sixty (60) days from and after the filing of the decision of the said Court of Appeals, pay into the Reclamation Fund the difference between the instalments on the basis of a construction charge of $40.00 per acre, and the installments of the construction charge stated in the aforesaid water right applications, or as the same may be modified or redetermined by the order of the said Circuit Court of Appeals, plus the penalties provided by the Reclamation Extension Act, said penalties to run from December 1, 1917, or the date of the application for temporary irrigation water pursuant to the terms and conditions of the stipulation of the parties herein, according as said section 1 or section 2 of the Reclamation Extension Act may be applicable, and until paid, and (4) each applicant shall also pay or cause to be paid into the Reclamation Fund an annual operation and maintenance charge in the amounts and at the times announced in public notice issued February 6th, 1920, or such amendments thereof as may be properly and lawfully promulgated, and all sums either on account of operation and maintenance or construction not paid when due shall be subject to the penalties prescribed by the Reclamation Extension Act; provided, however, [384] that the applications for temporary irrigation water heretofore entered into pursuant to stipulation of the parties herein shall be and remain in effect until water right application is executed and

delivered in the manner and within the time aforesaid.

IT IS FURTHER ORDERED, that the said plaintiffs shall execute a good and sufficient bond to the defendants, to be approved by the Court, in the penal sum of Ten Thousand Dollars ($10,000) conditioned nevertheless that if the said defendants shall prosecute their appeal to effect and, in the event they fail to make good their plea, shall pay or cause to be paid into the Reclamation Fund all costs of this suit and the penalties prescribed by the aforesaid Reclamation Extension Act and as provided in subdivision 3 of paragraph (c) hereof, then the said obligation to be void, otherwise to remain in full force and effect.

AND IT IS FURTHER ORDERED, that upon full compliance by the plaintiffs and the constituent members of the plaintiffs Yuma County Water Users' Association with all the foregoing terms and conditions of this order the defendants be and they are hereby enjoined and restrained until sixty (60) days from and after the filing of the decision of said Circuit Court of Appeals in said appeal, from shutting off irrigation water from the lands of the plaintiffs and the constituent members and stockholders of the Yuma County Water Users' Association situate within the Second Unit (Yuma Valley Unit) of the Yuma Project of the United States Reclamation Service.

DONE in open court at the City of Tucson, State

and District of Arizona, this twenty-sixth day of February, A. D. 1920.

(Sgd.) WM. H. SAWTELLE,
Judge of the District Court, District of Arizona.

[Endorsements]: In The District Court of the United States for the District of Arizona. Yuma County Water Users' Assn. et al, vs. W. W. Schlecht and David C. Caylor, Defendants.

Supersedeas Order. Filed Feb. 26, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [385]

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In the United States District Court for the District of Arizona.

No. E. 74—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Order Amending Supersedeas Order.**

1. For good cause shown IT IS HEREBY ORDERED: That the supersedeas order heretofore entered herein on the 26th day of February, 1920, be and the same is hereby modified in the following particulars:

(a) That the time limited therein for the perfecting of the appeal herein to the United States Cir-

cuit Court of Appeals for the Ninth Circuit is hereby extended to October, 1920, and the time within which water right applications are to be filed with the proper officers of the United States Reclamation Service is also extended to May 15th, 1920.

Done in open court this tenth day of April, 1920.

WM. H. SAWTELLE,
Judge of the U. S. District Court for the District of Ariz.

Approved as to form.

RICHARD J. COFFEY,
THOS. A. MOLLOY.

[Endorsements]: Filed April 10, 1920. C. R. McFall, Clerk. [386]

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In the District Court of the United States, District of Arizona.

TUCSON—E–74.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Supersedeas Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we, Yuma County Water Users' Association,

Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin, as principals, and Oscar P. Bondesson, W. E. Morrell, C. E. Yarwood and Martha L. Thielmann, as sureties, are held and firmly bound unto W. W. Schlecht and David C. Caylor, in the sum of $10,000, lawful money of the United States, to be paid to them, and their respective executors, administrators and heirs, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of August, 1920.

The condition of the above obligation is such that whereas the above named Yuma County Water Users' Association, Robert H. Thielmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin, have appealed to the United States Circuit Court of Appeals of the Ninth Circuit, from the judgment and decree of the United States District Court for the District of Arizona, entered on the 26th day of February, 1920, and from all thereof, and to reverse said judgment and decree, and all thereof:

NOW, THEREFORE, if the above-named principal obligors shall prosecute their said appeal to effect and answer all damages and costs if they fail to make good their plea, and shall pay, or cause to be paid, into the Reclamation Fund all costs of this suit and the penalties prescribed by the Reclamation Extension Act, approved August 3, 1914 (38 Stat. 686), then this obligation [387] shall be void,

otherwise remain in full force and effect.

YUMA COUNTY WATER USERS' ASSOCIATION.

By A. Y. GREER,
President.

Attest:

H. L. BELTZHOOVER,
Secretary.

ROBERT H. THEILMANN.
RALPH M. THURMAN,
J. A. DONOVAN.
ARCHIE J. GRIFFIN.
OSCAR P. BONDESSON.
W. E. MORRELL.
C. E. YARWOOD.
MARTHA L. THEILMANN.

State of Arizona,
County of Yuma,—ss.

Oscar P. Bondesson, W. E. Morrell, C. E. Yarwood and Martha L. Theilmann, being first duly sworn, each for himself, and not for the other, deposes and says: That he is worth the amount for which he has become surety on the above bond, over and above all his just debts and liabilities, in property situate in the State of Arizona, and not exempt from execution.

C. E. YARWOOD.
OSCAR P. BONDESSON.
MARTHA L. THEILMAN.
W. E. MORRELL.

Subscribed and sworn to before me this 17th day of August, 1920.

THOS. D. MOLLOY,
Notary Public.

The within and foregoing bond is hereby approved, both as to sufficiency and form, this 25th day of August, 1920.

WM. H. SAWTELLE,
Judge of said Court.

[Endorsements]: Tuscon, No. E.—74. Yuma County Water Users' Assn. et al., Plaintiffs, vs. W. W. Schlecht et al., Defendants. Supersedeas Bond. Filed this 25th day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [388]

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In the District Court of the United States, District of Arizona.

TUCSON—E–74.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Notice of, and Petition for, Appeal.**

To Hon. WM. H. SAWTELLE, District Judge:

The above-named plaintiffs, and each of them,

feeling aggrieved by the judgment and decree rendered and entered in the above-entitled cause on February 26, 1920 (not waiving their notice of appeal of February 26, 1920, referred to in the Supersedeas Order herein of said last-mentioned date), do hereby appeal from said decree, and all thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors accompanying this petition and filed herewith; and they, and each of them, pray that their appeal be allowed, and that citation (unless waived by the defendants), be issued as provied by law, and that a transcript of the record of the proceedings and documents upon which said decree was based, duly authenticated, be sent to said *Circuit of* Appeals as under the Rules of said Court made and provided, upon the plaintiffs filing the bond heretofore fixed in said Supersedeas Order.

Dated, Aug. 17, 1920.

THOS. D. MOLLOY.

The above appeal is allowed, upon the giving of the bond as required by law, and the supersedeas order in said cause, in the sum of $10,000.00.

WM. H. SAWTELLE,
Judge of said Court.

[Endorsements]: Tucson No. E—74. Yuma Co. W. Users' Assn. et al., Plaintiffs, vs. W. W Schlecht et al., Defendants. Notice of and Pet. for Appeal. Filed this 25 day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [389]

In the District Court of the United States, District of Arizona.

TUCSON—E-74.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Assignment of Errors.**

Come now the above-named plaintiffs, Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin, and each of them, on this 26th day of April, 1920, and say that the judgment and decree entered in the above-entitled cause on the 26th day of February, 1920, is erroneous and unjust to said plaintiffs, and each and all of them, and that in the record and proceedings in said cause there is manifest error committed by the United States District Court in and for the District of Arizona, in the following assignment of errors upon which the said plaintiffs will rely upon the prosecution of their appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows, to wit:

I.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Oscar P. Bondesson:

Mr. MORTON.—What kind of crops have you raised there?

Mr. MOLLOY.—It seems to me, if the Court please, that is irrelevant and immaterial, and not proper cross-examination. We object for both of those reasons.

The WITNESS.—I farmed all the area of that land, and I grew thereon alfalfa and grain crops, such as feterita, barley and cotton. My place is now rented. [390]

Mr. MORTON.—Is it upon a cash basis?

WITNESS.—Yes, sir. I rent my land for $30 per acre per year, and the lessee pays for the maintenance charge. I get that for the rent of the land itself, and if there are any construction charges I would pay the construction charges, but not the annual maintenance. I pay also my dues to the Water Users, which are nominal, very small, and taxes, annually. I am not paying a construction charge at the present time, as I am one of those who took advantage of the situation and made a temporary application for water service pending the determination of this suit.

Mr. MORTON.—Mr. Bondesson, do you recall at all the returns of your place in the last few years in the way of amount per acre, gross?

The WITNESS.—What particular crops do you refer to?

Mr. MORTON.—Taking your place as a whole, would you be able to state in any way about the amount per acre, gross, that has been produced on that place in money?

The COURT.—What is the gross revenue per acre?

The WITNESS.—I would not say. It is a difficult question, unless it was taken year by year.

Mr. MORTON.—Well, take the year 1916, Mr. Bondesson?

A. Yes, sir; 1916 was a year of large prices for produce. Cotton was beginning to be a pretty good price. As I remember it, I pastured my alfalfa lands in 1916, and received a gross revenue of close to thirty dollars per acre. That was gross.

Q. As to the crop lands?

A. That was as to alfalfa, about one hundred acres or less was in alfalfa that year, and it brought me, as I remember it now, a little less than thirty dollars. It was pastured throughout the year to cattle.

Q. Was all the land in alfalfa at that time?

A. No. [391]

The WITNESS.—I am familiar with the regulations and actions of the Reclamation Service in securing crop returns every year; they used to come around for that purpose. I don't remember of having made any directly to them for the last two or three years, however, but I do remember that, say, three or four years ago they used to come around for that purpose. The water master used to come and ask about these things generally. I think

that once or twice I made out those returns upon the regular card and furnished them to them. The card that you show me discloses that it is my card and in my handwriting, and that the returns for my land per acre for the year 1916, according to this card, was practically thirty dollars per acre for the alfalfa in round figures. There were sixty acres of cotton and seed. The gross return is shown to be $8,640 for cotton, $1,400 for the cotton seed; in round numbers $10,000 for the sixty acres, gross return. The entire ranch would be a gross return of $13,000. The average value per acre stated to be $81.50.

Mr. MORTON.—This is a card which is a part of the official records of the project office, and I should like to offer it for introduction with the privilege of substituting a copy.

WITNESS.—I do not recall the figures for the returns upon my place for the year 1917, but it was as large as that, if not a little more. 1917 was an exceptionally good year on account of high prices, and in 1918 I received thirty dollars an acre rent. It was rented in 1918 and is now rented; the entire 160 acres for thirty dollars per acre for 1918 and for this year. The lease runs for three years, which is practically net to me, except taxes, interest on the investment and that sort of thing. I have no figures for the year 1915. The returns were very much less, however, than in 1916. In 1915 prices were just beginning to advance. I had no cotton in 1915, and that has been the big money crop really. I had alfalfa and grain crops, but it

was a paying proposition in that year. [392]—for the reason that all of said testimony was irrelevant and immaterial, and not proper cross-examination, and the nature and extent of the crops raised or not raised by the witness Bondesson in the years 1915–16–17–18 on his land within the Yuma project, and whether or not such crops, if any, were raised at a profit or at a loss, and whether or not the witness Bondesson rented his said land for the years 1918, 1919 and 1920 at the sum of thirty dollars per acre, net, or whether he rented it at all, or not, could not, and did not, throw any light upon the questions involved in this case and the issues set forth in the pleadings, and did not tend to prove or disprove whether or not the Secretary of the Interior in the year 1904 made examinations and surveys for the location and construction of the Yuma project; and whether or not said Secretary determined that the Yuma project was practical, and let contracts for the construction of the same; and whether or not he gave public notice as required by Section 4 of the Irrigation Act of June 17, 1902; and whether or not he estimated and determined at that time the cost of said Yuma project; and that such testimony could not, and did not, tend to prove or disprove whether or not the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit C, and introduced in evidence as Defendants' Exhibit 7, was ambiguous or unambiguous; and did not tend to prove or disprove whether the project of the proposed works mentioned in said contract was completed April 6, 1917, or at the time

of the trial; and for the further reason that the questions drawing forth said testimony were not proper cross-examination, the witness not having been interrogated by the plaintiffs as to any time or circumstances later than the year 1904, and said witness not having been interrogated as to what, if any, disposition he had made of his lands in the years 1915, 1916, 1917 and 1918, or at all; to all of which ruling of the Court in overruling plaintiffs' objection to said testimony and in admitting the same plaintiffs duly excepted at the time. [393]

II.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Oscar P. Bondesson:

Q. At the time you refer to, on May 28, 1904, and during that year, as a general rule, what were land values down there per acre?

The WITNESS.—Land had a value at that time of—well, it would depend on what state of cultivation it was in, or whether it was clear or level. I would say raw land at that time was worth about around tyenty-five dollars up.

The COURT.—How about cleared land?

A. It would depend upon the amount of labor that had been expended on it.

Mr. MORTON.—You mean raw land without any work done on it at all was worth twenty-five dollars?

A. Unimproved land was worth right around twenty-five dollars and up.

A. On May 28, 1904? A. Yes, sir.

Q. That was at the time that the project was being discussed, wasn't it? A. Yes, sir.

Q. The proposed project. A. Yes, sir.

--for the reason that the value of lands within the Yuma project on May 28, 1904, or whether they had any value at all, or not, was irrelevant and immaterial, and did not tend to prove or disprove any issues in this case, and the questions drawing forth said testimony were not proper cross-examination, for the reason that plaintiffs had not interrogated said witness as to the value of his lands, or any other lands, within the Yuma project in the year 1904; and for all the other reasons set forth in the preceding assignment of error No. I, which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment No. I, for a statement of said objections and wherein the Court erred in admitting the testimony [394] set forth in this assignment of error; to which ruling of the Court in overruling the plaintiffs' objection to admitting said testimony, the plaintiffs duly excepted at the time.

III.

That said District Court erred in not granting plaintiffs' motion to strike all the testimony of the witness Bondesson set forth in the two preceding assignments of errors Nos. I and II, for the reason and upon all the grounds set forth in the two preceding assignments of errors, Nos. I and II, which are hereby referred to and made a part of this assignment of error, said grounds and reasons not being set forth here in full for the sake of brevity;

and it is prayed that reference may be had to said assignments for the reasons in support of this assignment of error; that plaintiffs now except to their refusal and failure to strike said testimony from the record plaintiffs' said motion to strike not being passed upon during the trial of this case, or at all, except in effect by the final decree dismissing plaintiffs' bill of complaint.

IV.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, to wit:

> Mr. MOLLOY.—"The plaintiffs offer to prove, and hereby avow their readiness and ability to prove by the testimony of numerous witnesses to the number of at least twenty, in addition to the testimonies of plaintiffs' witnesses hereto examined, that plaintiffs' exhibit 15 for identification, the certain pamphlet testified to by the plaintiffs' witnesses heretofore examined, was generally circulated amongst all of the land owners within the Lower Colorado Irrigation District on May 28th, 1904, and continuously thereafter until ninety-eight per centum of all of the land within the Lower Colorado Irrigation District had executed subscriptions for the capital stock of the plaintiff corporation by executing, acknowledging and delivering, each of them, an instrument similar in tenor and effect to the sample form thereof offered in evidence as plaintiff's exhibit 14; and that at the mass

meeting held in the town of Yuma, Arizona, on the night of May 28th, 1904, testified to by plaintiffs' witnesses heretofore examined, F. H. Newell, Chief Engineer of the U. S. Geological Survey and J. B. Lippincott, Supervising Engineer of U. S. Geological Survey, and each of them, stated and represented to the land owners assembled at said mass meeting, [395] that they, the said Newell and the said Lippincott, and each of them, represented and there spoke for and on behalf of the Secretary of the Interior of the United States of America, and that the written statements and representations set forth in said Exhibit 15 and the plat and drawings annexed thereto, were true and correct and could be relied upon, and that the Yuma project as therein described and thereon delineated could be and would be constructed, as a whole, within two years from the actual commencement of work thereon, at a cost of not to exceed $35.00 per acre, and possibly less, and that they, and each of them, the said Newell and the said Lippincott, would pledge, and did then and there pledge, their professional reputations as engineers, such as it was, that said project could be and would be so constructed within said time, and at said cost; and that each and all of said proffered witnesses, and each and all of the land owners present at said mass meeting believed in and relied upon the statements so made by these said engineers, and relied upon the statements, representations and

delineations contained in said pamphlet, and the said land owners, and the said proffered witnesses, and each of them, were thereby induced to, and did, execute, acknowledge and deliver to Yuma County Water Users' Association, the plaintiff corporation, their subscriptions for stock identical with plaintiff's exhibit 14, thereby placing a lien upon their land to secure the payment of the estimated cost of said project; and that if said witnesses, or said land owners, or either of them, had known or could have foreseen that the cost of said project would have exceeded the sum of $35.00 per acre, or, at the extreme outside, the sum of $40.000 per acre, and that said project would not be completed within two years from the time of commencement of work thereon, that they would not, nor would either of them, have executed or delivered said stock subscription agreements."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted.

V.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, to wit:

Mr. MOLLOY.—"The plaintiffs offer to prove, and hereby avow their readiness and ability to prove by the testimonies of numerous witnesses, not less than twenty-five, that the

charge of $75.00 per acre provided for in the so-called public notice of April 6, 1917, concerning said Yuma project, an unjust and inequitable burden upon the lands within said Yuma project, and the owners thereof, and that said owners cannot afford to pay such charge, the same being more than said lands will bear, one year with another, taken over the period of time provided for the payment of the annual installments of the construction charge of said project, and that the same is, and will be, excessive, unjust and grossly exorbitant, and out of all proportion to, and greatly in excess of the actual value of the works constructed, or to be constructed, in said Yuma project, for the irrigation and reclamation of said land; and that the charge of the sum of $1.50 per acre per annum, for each acre of the land within Tract C, as described in the complaint, as a minimum operation and maintenance charge is, and will be inequitable, unjust, illegal, arbitrary, excessive and | unreasonable [396] and greatly in excess of the reasonable cost of the operation and maintenance of said project."

—to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted.

VI.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the

proof contained in the following offer of evidence, to wit:

> Mr. MOLLOY.—"Plaintiffs offer to prove that there is within the limits of said Lower Colorado Irrigation District, as described in the complaint, some six thousand acres of land which was, on May 10, 1904, in private ownership, although within the exterior limits of certain withdrawals under the second form of withdrawal, according to the provisions of Reclamation Act of June 17, 1902, and of which said lands were thereafter, and prior to the commencement of this suit, relinquished to the United States and re-entered by homestead claimants under said Act, in tracts of 160 acres, and of other areas greater than 40 acres, for which the Register and Receiver of the Phoenix, Arizona, land office, received and accepted the fees required by law for the entry as homesteads of said respective tracts so re-entered, and that said new entrymen have been permitted by the Secretary of the Interior to hold all of the areas so re-entered as homesteads without diminution or confirmation to a farm unit for a great number of years in each of said respective cases, to wit: The period of ten years, including John W. Hevener and his homestead entry for the northwest quarter of Section 17, Township 10 south, Range 24 west, G. & S. R. Meridian, in Yuma County, Arizona, and many others similarly situated to said Henever."

—to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted.

VII.

That said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Arthur P. Davis:

Mr. MORTON.—Mr. Davis, it has been stated that there was an understanding with these people in those early days that the project would not cost more than thirty-five dollars per acre. You have testified, as I understand it, that that understanding on the contrary was that the engineers, according to their estimates then, deemed it would cost thirty-five dollars to forty dollars per acre, your own figure being forty dollars, but that in any event the fund would have to remain intact and actual cost would control. Now describe in as brief a form as you can and as clearly as you can and in as general form as you can the reasons for the increase of cost and events leading up to it. [397]

A. Briefly, the reasons for the additional cost were three: The first is the unexpected conditions that developed as to poor rock and some other physical conditions; the difficulty in dealing with the rivers which were then not so well known as now, and other minor physical difficulties. Second, the change in industrial conditions which was very important. There was a very rapid increase in the price of labor, price of material, and especially in the scarcity of efficient labor. That was one of the

chief difficulties the contractor had which led almost to his ruin and calamity in October, 1907, when there was an industrial collapse. It had been greatly hastened by the destruction of San Francisco, which in its building in 1906 and 1907 absorbed building materials and labor which affected greatly the western part of the country. The conditions were generally changed, the plans were changed in order to make a better project and more endurable project, one of the features being substitution of the siphon under the Colorado River for one under the Gila, which was decided upon for the reason there were very grave doubts of the feasibility of maintaining such a crossing on the Gila River. The original plans provided that the main canal which was to serve the entire Arizona side of the project, including the lower Yuma Valley, should be built on the Arizona side and it involved a crossing of the Gila River and a large mileage of the canal in the valley of the Gila River where it might be attacked by that stream when in flood, and if reached would deprive the entire lower valley and a portion of the upper valley of any water for irrigation and in a high, arid climate of this kind that was a very serious jeopardy. Largely to avoid that jeopardy the crossing plans were changed and the main canal was finally built on the California side and the portion to water the lower Gila Valley was brought through a siphon under the Colorado River just below the city of Yuma. Another change was that a very much larger mileage of canals was built than was shown

on the plat which has been placed in evidence here; approximately, I think, four times the mileage, although the increased mileage was of small conveyance merely. And it is those canals that contain a large number of small wooden structures. The main structures on the Yuma Project being of a permanent nature. That policy is one which we have developed with the experience of surveys, and observations of other works, as being the wise one.

Q. Was there any change in the hours of labor, the day's labor, hours of labor?

A. Technically, no. The law was not changed. The original Reclamation Act contains a paragraph requiring eight hours to constitute a day's labor for a common labor—labor of mechanics, but it was a practice in those days for contractors to make agreements with their men and work then ten hours and they probably made their bids on that basis. At any rate that was the practice and J. G. White & Company began that practice and carried it on for some time and were arrested by the local authorities and I understood paid a fine and had to discontinue it and work men eight hours. They had a great difficulty in securing labor which was one of the strongest items involved in the increased cost of the Laguna Dam, and another cause the increased difficulty of navigating the Colorado River. The contractor began, I believe, first to do some freighting on the Arizona side and found that the Gila River interrupted his traffic frequently, or for other reasons he changed to the

river for navigation, but the Colorado River broke into Imperial Valley and began cutting its channel very rapidly and the effect of that cutting reached back well into the Yuma Valley. I mean cutting the bottom lower and lower. The river in its former position reached sea level and at the Gulf of California, something over a hundred miles below Yuma, and by the change in approximately the same distance or perhaps a less distance, reached an elevation practically two hundred and fifty feet lower than sea level, so that it had a very great declivity. It cut great, deep [398] gorges through the Imperial Valley and caused cataracts which were undermined by the high velocity causing deep gorges. The effects of that reached up, I don't know how far, but above the city of Yuma. I know that from my experience in navigating the Colorado River. Prior to that cutting the Colorado River was being navigated to the Laguna Dam and above, after the cutting I found it impossible to so navigate it. It formed a series of ratchets which prevented the passing of the boats. I know for I was on a boat with a good pilot that could not pass, and we spent many hours there. That and other difficulties led to the abandonment of the navigation of the river and to the construction of a wagon road on the California side by which considerable freight was hauled to the dam. Those three methods, a road on the Arizona side, navigation of the river and a road on the Colorado side, were the methods that had been used for freighting to the dam during the pendency of the work of the

contractor—during the progress of the work of the contractor at the Laguna Dam. There was no railroad constructed by the contractor. When the Government took over project upon the failure of the contractor, the experience therefore had by him demonstrated that those methods of transportation were not only enormously expensive but ineffective, and had contributed largely to his loss and at last it was decided that a railroad must be built and such a railroad was built under the auspices of the Government. That railroad is in existence and is used for occasional travel, for hauling rock from the Colorado River to the dam and maintenance of levees in the lower valley and upper valley, also for taking such material as required to the Laguna Dam.

Q. What was the effect of all this so far as cost is concerned?

A. These things greatly increased the cost of the dam under any management, irrespective of management.

Q. Were, or were not other portions of the project affected in the same way by increase in material, labor, etc.? A. Oh, yes, yes.

—for the reason and upon the ground that it was irrelevant and immaterial what the actual cost of the Yuma project was, or should have been, the Secretary of the Interior having, in the year 1904, under the provisions of the Reclamation Act of July 17, 1902 (32 Stats. 388), determined the estimated cost of the Yuma project, and said act providing that such estimated cost and not the actual

cost should be returned to the Reclamation Fund, and it will now be inequitable and wrongful, after the plaintiffs in this case, and those for whom they sue herein, have mortgaged their lands to secure the payment of the estimated cost, as so fixed and determined by the Secretary of the Interior, and not the actual cost, to permit the defendants, thirteen years after the cost of the Yuma project has been estimated according to law to levy on the lands of the plaintiffs, and those for whom they sue, a charge of more than double the estimated cost; to which ruling of the Court in overruling [399] plaintiffs' objections to said testimony and in admitting said testimony the plaintiffs duly excepted at the time.

VIII.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Arthur P. Davis:

Q. Mr. Davis, there has been a reference here to surveys—preliminary surveys having been made in the very early days and the delineation at that time of a so-called Lower Colorado Irrigation District, would you describe what was the nature of those surveys that were made prior to, we will say, the meeting of May 28th, 1904? What did they constitute, if you remember anything about it, and what was the significance of having this Lower Colorado Irrigation District, designated as an area there? What was its significance?

Q. All I want is the nature of them. Were they

preliminary, or permanent, or in the permanent locations of any canals?

A. At the time of the meeting of May 28th, 1904, there were no surveys or locations of anything that anybody regarded as permanent. There were approximate locations of some features. The principal feature of that character being the Laguna Dam, but even that was subject to change, not only in location but design, and was subsequently changed in design and I think in location. There was not at that time a definite determination of the irrigable area in Lower Colorado Irrigation District.

Q. What was the significance of acquiring that body of land there?

A. The significance of those plans, is your question?

Q. The significance of the lower Colorado District as an area; what was it all about?

A. It was the area in which we were endeavoring to work out and had tentatively worked out a feasible irrigation project in which we had made an attempt to approximate the acreage that could be covered and the works that would be necessary for that and their probable cost.

Q. Mr. Davis, you recall the point that was made this morning and the reading of an excerpt from the contract between the Association and the secretary wherein we had a statement that the irrigable area shall be determined upon careful surveys and examination—that was the substance of it. That contract as it is in evidence, attached to the com-

plaint, was dated some time in July or May 31st, if I remember rightly, 1906. In order to determine the irrigable area and to carry out the project, have surveys and investigations since been made?

A. Yes.

Q. And has the irrigable area of that project been determined?

A. Approximately, yes. The area of the so-called north and south Gila Valleys, also referred to in the complaint as Tracts A and B of the Lower Colorado Irrigation District, were withdrawn from entry in the early days, but have since been restored to entry, the purpose of the withdrawal was to prevent prior entry before the proper time, pending examination and the determination of the feasibility of the project and the final action even if not feasible. The purpose of the restoration was the last step in the abandonment of that part of the project as far as irrigation was concerned by this project.

The COURT.—In other words, when you determined it was not practical to irrigate they were restored to entry?

WITNESS.—Not immediately. It is a custom of the [400] Irrigation Service to not restore lands while there may be danger of people being misled into filing upon the land and we have frequently held lands beyond the time of the actual needs of the act for that reason.

The COURT.—In any event you determined it was not feasible to include them within the project?

A. Yes, and that was the purpose of the restoration, the reason for it.

Q. Will you tell us something about the situation up there on the north and south Gila as to the practicability of those areas becoming a part of the project and the reason for their exclusion?

A. They are excluded—

A. This map has upon it in dotted lines the course pursued at various times by the Colorado River and the Gila River. That color in yellow shows the course of the Colorado River in 1903 and the course of the Gila River along the lower line. The red line indicates the boundary and course of the Colorado River in the upper part and the Gila River in the lower part of 1917; and the various dotted lines show the various peregrinations and meanderings of the rivers in the early days. Now this shows that in 1903 the Colorado River ran along the yellow line which is far to the north of where it afterwards came and by its cutting to the southward, it cut off the land which has been intended to be occupied by levees and the canals. At the same time the meanderings of the Gila River showed its erratic disposition and also the Gila was a much more difficult river to control than the Colorado for the reason the Colorado rises slowly and gives warning. That is not true of the Gila. It also in extreme floods discharges more water and at a higher velocity than the great Colorado. For those reasons it is far harder to control the Gila than the Colorado. That is the principal reason for this change. Another is—

The COURT.—Where is that land in question?

A. It is this area in here (indicating on map).

The COURT.—Omitted from the project?

A. Between this river and the Yuma mesa (Indicating on map).

The COURT.—You were asked to state why it was not practical to include that in the project as originally planned.

A. One reason is the impracticability of controlling the Gila River by means of levees. Without levees these valleys will all overflow and their cultivation will be so precarious that we don't consider it feasible for the part nearest the river. Some of the higher lands may be cultivated but only a very small area for the same reason of the erratic condition and impracticability of controlling the Gila River within the limits of expense, which made it necessary to bring the main canal of the Yuma project down the river from the Laguna Dam.

A. Removing the main canal to the western side of the river, or the location of it before the construction, and crossing the Colorado River was due largely to this impracticability of controlling the Gila River so not to wipe out the crossing.

The COURT.—Was it ever contemplated that you would control either one of these rivers with levees?

A. Yes. Levees have been built in the valleys and this levee on the eastern bank of the Colorado is still in existence.

The COURT.—Do you mean the levees here (indicating on map)?

A. In a general way it is parallel with the river, but the original location of that levee has been obliterated and the present course is shown on the map and marked "Levee."

The COURT.—This levee here along the red line?

A. No, the levee is along the Gila land shown on this map. Every time that river goes in flood it changes some part of its course and frequently very radically. Now, the removal of the main canal to the west side of the river which was necessitated [401] by the erratic habits of the Gila River, made it impossible to cover by gravity as large an area for the reason that a canal with very large discharge requires much less grade than a canal of small discharge so that a canal on the smallest practical grade and with a capacity proper for the irrigation of irrigable land in the Gila valley follows a course roughly parallel, but lower than the original main canal and crosses the Gila river in the neighborhood of Sections 16 and 21. I have another map with the course sketched; that blue line (indicating on map).

A. The blue line on this map shows the approximate location of the canal headed at the Laguna Dam carrying sufficient water for the two Gila valleys and reaching to the neighborhood of Yuma. It leaves out a large portion of the upper part of both valleys; a portion of the north Gila valley having also been eliminated by the changes in the

Colorado river reduced this acreage to only thirty-five hundred that can be irrigated by gravity. That area can be reached by pumping. That so radically changed the areas, on the basis of our knowledge in 1904, that in my opinion the system is not a feasible system. Another reason is one developed since that date. We found that the Colorado River passes freely under the levee and at the time of the high waters appears on the surface, so that the construction and maintenance of the levees does not protect them from overflow. It makes it necessary if they are to be irrigated to provide them with drainage canals of very large capacity, the water from which must be pumped into the river. We have had a very expensive and serious experience on the opposite side of the river, and where the Secretary of the Interior in an effort to do justice has allowed the people to abandon their claims and take up under preference homesteads in the lower Yuma valley in exchange. And they have suffered serious loss,

—for the reasons and upon the ground that such testimony is irrelevant and immaterial as the examinations and surveys of the Yuma project had been duly made under the provisions of the Reclamation Act of June 17, 1902, as conclusively shown by the evidence in this case, in the years 1902, 1903 and 1904, and prior to May 10, 1904, by the Secretary of the Interior for the purpose of locating and constructing said Yuma project, and that upon such examinations and surveys the Secretary of the Interior had, on May 10, 1904, deter-

mined the feasibility and practicability of said Yuma project, and all thereof, including the north and south Gila valleys, described in plaintiffs' complaint as Tracts A and B, respectively; and did thereafter duly let contracts for the construction thereof; and any opinion of the witness Davis in 1919 as to whether or not said project was then, or on April 6, 1917, feasible and practical is irrelevant and immaterial and an attempt to impeach and impair an official and judicial determination of his superior officer, the Secretary of the Interior, made in 1904, when such officer had jurisdiction to so determine and estimate. And upon the further [402] ground that it is irrelevant and immaterial what was the significance of the acquisition (if there was an acquisition) of the Lower Colorado Irrigation District, for the reason that all such questions and negotiations were merged in the written contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7; and said testimony of said witness was an attempt to vary the terms of said written instrument by parole. And for the further reasons that all the surveys and plans referred to in said testimony had been reduced to writing, and the plans and surveys themselves were the best evidence; to which ruling of the Court in overruling plaintiffs' objections to the introduction of said testimony and in admitting its introduction, the plaintiffs duly excepted at the time.

IX.

That said District Court erred in admitting, over, plaintiffs' objections, the following testimony of the witness Arthur P. Davis:

> Witness: We began the construction of the drainage canal in the lower valley some time ago. I don't remember how long ago—over two years —and immediately a protest was set up by the people in the valley against it, whose judgment was, it was not needed. Written objections were made to the Secretary of the Interior and referred to me, and written objections were made to me personally and I was requested and urged to go to the Yuma valley and hear representations on that subject, and I was there in Yuma visited by a large representation of the farmers of the Yuma valley, most if not all of whom were members of the Water Users' Association and some I believe were officers thereof. They presented me with a stack of cards, and a petition in strong terms requesting that the drainage be stopped and abandoned, and very strong representations were made to me at the same time to the same effect, and we at that time had two dredges in the valley, one was at work and the other about to be put to work. I was of the opinion that the time for beginning had arrived; that something had already developed and it might be carried forward slowly and it was my intention to have two dredges there and perhaps order others if needed, but owing to those protests, having already started one dredge, we confined our operations to one dredge, and in this

meeting I explained the operation with the idea that when we got to a certain point in the valley we would stop.

—for the reason that said testimony is hearsay; to which ruling of the court in overruling plaintiffs' objections to said testimony, and in admitting the same, the plaintiffs duly excepted. [403]

X.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of Arthur P. Davis:

Q. Assuming that the public notice that was issued on April 6th, 1917, had been postponed until the piece of drain referred to by Mr. Bondesson—supposing that had been deferred until that piece of drain had been constructed, would you be able to say then that the drainage system was completed?

A. No, we couldn't as I construed your meaning by the word "completed." Do you mean that more drainage would never be necessary in the valley?

Q. That is the idea.

A. I don't think that time will come in my life time no matter what we do.

Q. Then for example, the mere building of the central drain is but the start on that work, is it not?

A. Yes, I think so; I may say it is an important start.

Q. Viewed from the standpoint of your never being able to complete it in the sense that no more would be necessary, it is a start; is that the idea you intend to convey?

A. The construction of the drain will by no means

involve the drainage problem in this valley.

Q. Let us assume that we had this extra piece of drain constructed that was referred to this morning that you are working on now, would that be the completion of the drainage system in the sense of the fact that something else might not arise later that would require more drainage?

A. Something else would arise later.

Q. Now, when that had risen and you had built an extra drain to that particular place, we will say in some locality where necessity had developed, where it seemed wise and not a foolish policy to build there, would there be any assurance then that there would not another place arise?

A. I think counsel for plaintiff has answered that as being a very speculative matter; that is true.

Q. On the other hand, what is the condition of the project? Is it in working condition so far as the lower Colorado valley is concerned; is it in working condition in so far as one is able to ascertain conditions at that time so far as the drainage canal is concerned?

Q. As a whole is it in a completed condition?

A. As a practical matter, yes; the only sense in which the project is completed or ever will be completed.

The COURT.—When did that state occur?

A. A considerable time before the issuance of the public notice; the exact date I cannot mention.

The COURT.—Which public notice?

A. The one issued in April '17, I believe.

Q. You say "as a practical matter, yes," will you

explain your answer there, please?

A. I mean that the delivery of water and the facilities for the delivery of water and irrigating and cultivating that land are excellent and are hard to beat; that the drainage has been kept close up to the limit of practical economical construction and that no considerable proportion of the land in the lower valley, as irrigation projects go, has ever been impractical of cultivation or irrigation by reason of delay of drainage.

Q. Will, or will not it be necessary in the future history of that project to construct supplementary drains?

Q. The point I want to bring out is as to whether or not there will not be some additional drainage necessary?

A. Probably not. [404]

—for the reason and upon the grounds that said testimony was irrelevant and immaterial and too speculative, it not tending to prove or disprove whether or not the proposed works of the Yuma project as set forth and described in the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed or uncompleted at the time of the institution of this suit, or at the time of the trial; what will happen in the future or subsequent to the trial herein could not tend to throw any light upon what had happened on April 6, 1917, the date of the so-called public notice involved in this suit; to which ruling of the Court in overruling plaintiffs' objection to

the admission of said testimony, and in admitting it, the plaintiffs duly excepted at the time.

XI.

That said District Court erred in admitting over the objections of the plaintiffs the following testimony of the witness Joseph B. Lippincott:

Q. Now what you have stated is all you have to base your opinion upon that the Yuma Project is finished? A. No, sir; no, sir.

Q. Well, what else?

A. By the Yuma project I mean the Yuma project as finally adopted by the Secretary of the Interior. The fact that the Yuma Valley is a going business, going farming community, the fact that the lands are highly improved, the fact that the whole unit shows the successful operations of farming in that valley, paved roads and good houses and fields under—

A. —fields under intensive cultivation, the fact that the farmers of this region are apparently able to successfully carry on farming operations under irrigation. In fact, the Yuma Valley presents to me one of the most prosperous and successful farming demonstrations that I have seen in this country. I would say as far as the cultivation of lands by irrigation in this Yuma Valley is concerned that the project was finished. There doubtless will be many things to do in the future. I doubt if the time will ever arrive—not arrive in my lifetime, when construction work is no longer necessary in the Yuma Valley, just as the time never seems to arrive when the construction work on these big

transcontinental railroads has reached their final completion, and the projecet is a finished project in my judgment in that the land owners of that community are able very successfully to carry on the business for which that project was designed.

—for the reason and upon the grounds that said testimony was not responsive to the questions asked and was not within the scope of the cross-examination of the witness, and such testimony did not tend to prove or disprove whether or not the proposed works [405] of the Yuma project mentioned in the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed, and the evidences of prosperity testified to by said witness is no evidence whatsoever that the Yuma project was completed as a physical fact; to which ruling of the Court in overruling plaintiffs' objection to said testimony, and in admitting it, the plaintiffs then and there duly excepted.

XII.

That said District Court erred in denying plaintiffs' motion to strike from the record the testimony of the witness Joseph B. Lippincott, set forth in the preceding assignment of error No. XI, to which reference is hereby made for the sake of brevity, for the reasons and upon the grounds set forth in said preceding assignment of error, which reasons and grounds are not herein set forth for the sake of brevity, but it is prayed that reference may be made to said assignment of error; to

which ruling of the Court in denying said motion the plaintiffs then and there duly excepted.

XIII.

That said District Court erred in refusing, at the close of the evidence in the trial of this case, to grant leave to the plaintiffs to file a supplementary pleading herein in words and figures, as follows, to wit:

(Title of Court and Cause):

Plaintiffs complain, and allege, and respectfully show the Court that, as plaintiffs are informed and believe, since the commencement of this suit and in the summer of 1917, the Secretary of the Interior did make certain orders whereby he purported to declare and determine that the Yuma project or Reclamation Service as embraced within the lower Colorado Irrigation District, as described in the complaint, was then and there completed and finished, notwithstanding that certain portions thereof, to wit, tracts A and B, as set forth, described and delineated in the complaint, had not been in any manner physically reclaimed, as more particularly set forth in said complaint, and notwithstanding that the drainage system of Tract C, as described in the complaint, had not been completed; that as plaintiffs are informed and believe, the said orders so made by the Secretary of the Interior, were made for the purpose of affecting the ultimate adjudication of this suit, and were made by the Secretary of the Interior without due and proper investigation, and [406] without jurisdiction, for the reason that the Secretary of the

Interior had, many times from the year 1904 until the end of the year 1916, declared and determined that said portions of the Yuma project were feasible, practical and advisable, and in truth and in fact, that portions of said project were at the time of making of said orders, and each of them, feasible, practical and advisable of construction as originally planned and determined by the Secretary of the Interior in the year 1904; and the Secretary of the Interior was not, in the manner of the year, 1917, in possession of any facts or information that would justify the making of said orders, or either of them; and that the making of said orders was without the jurisdiction of the Secretary of the Interior, and in violation of the letter and spirit of the contract entered into between plaintiff corporation and the United States of America, on May 31, 1906, a copy of which is annexed to the complaint herein as an exhibit, and the said orders, and the making thereof, was and is an abuse of any and all discretion vested in the Secretary of the Interior by law, or at all; and it would be inequitable and unjust to permit the defendants in this case to deprive the plaintiffs herein of the use of irrigating water in the manner described in the complaint, or at all, because of the making of said orders.

*II.*

That, as plaintiffs are informed and believe, in the year 1918, and subsequent to the commencement of this suit, the Secretary of the Interior, acting for and in behalf of the United States of America,

entered into a certain written agreement with Imperial Irrigation District, a municipal corporation of the State of California, whereby the said municipal corporation promised and agreed to pay to the United States of America, the sum of One Million Six Hundred Thousand Dollars, for certain rights and privileges in the use of and taking of water from the Lagoona Dam of the Yuma project of the United States Reclamation Service, whereupon, the Secretary of the Interior, acting for and on behalf of the United States of America, promised and agreed to and with the plaintiff corporation, acting through and by its duly authorized representative, one Mulford Winsor, that said sum of One Million Six Hundred Thousand Dollars, so agreed to be paid by said Imperial Irrigation District to the United States of America, should be, and would be, credited to the land owners within Tract C of the Yuma project, otherwise the Lower Yuma Valley, as described in the complaint, upon the amounts declared to be due upon their lands for the cost and expense of said Yuma project, in the same proportion as the cost of the Lagoona Dam of said project had been pro rated upon the lands of the said land owners; for which reason it would be unjust and inequitable to permit the defendants in this suit to deprive the plaintiffs of the use of irrigating water in the manner described in the complaint, or at all.

WHEREFORE, plaintiffs pray that they have the relief prayed for in the complaint filed herein.

THOS. D. MOLLOY,
Solicitor for Plaintiffs.

(Duly verified.)

—for the reason and upon the ground that such refusal was in abuse of the discretion of said Court, said pleading being necessary and proper, as it set up matters and things that had occurred since the filing of the original complaint herein, and prepared to meet and set forth a defense created by the defendants and [407] their superior officers subsequent to the filing of the complaint herein, and that the second paragraph thereof set forth an equitable defense against the charge of seventy-five dollars per acre, even if such an amount had been the estimated cost as originally determined by the Secretary of the Interior; to which ruling of the Court in refusing permission to file said pleading plaintiffs thereupon duly excepted.

XIV.

That said District Court erred in finding and deciding that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands benefited, and that such cost, when collected, should be paid into the Reclamation Fund to replenish its fund, and thereby make irrigation at least a self-sustaining enterprise; such finding and decision being contrary to the provisions of Sections 2, 3 and

4 of said Reclamation Act of June 17, 1902. (32 Stat. 388.)

XV.

That said District Court erred in finding and deciding that it cannot be supposed that the estimated cost based "on opinion and roughly made from imperfect data," such only as was available in laying out work on a large scale is all that the land owners can be required to pay regardless of the actual cost of the project; that to place such a construction on the Reclamation Act would in effect nullify it and defeat its every purpose; that it was the purpose of Congress to require the charges to be equitably apportioned with a view of returning to the Reclamation Fund the entire cost of construction thereof, and that the term "estimated cost" must be interpreted and construed in the light of the objects and purposes sought to be accomplished, and of the situation surrounding the proposed project during and at the time the preliminary examinations and surveys were being made; said finding, decision and construction of law being contrary to the [408] letters and spirit of the Reclamation Act of June 17, 1902, and particularly Sections 2, 3 and 4 thereof.

XVI.

That the said District Court erred in finding and deciding that the estimated cost of the Yuma Project is the cost as finally announced by the Secretary of the Interior on April 6, 1917, for the reason that the evidence conclusively shows that the Secretary of the Interior did, on or about May 10, 1904,

and some thirteen years prior to April 6, 1917, fix and determine the estimated cost of the Yuma Project at less than forty dollars per acre; such finding being unsupported by the evidence and against the evidence, and contrary to the letter and spirit of the Reclamation Act of June 17, 1902.

XVII.

That said District Court erred in finding and deciding that the Yuma Project has cost greatly in excess of the estimate by the engineers; it being irrelevant and immaterial whether or not the actual cost is greatly, or at all, in excess of the estimates made by the engineers, for the reason that Section 4 of the said Reclamation Act requires and determines the amount to be repaid into the Reclamation Fund as the estimated cost originally made by the Secretary of the Interior; in any event, there was not sufficient, or any, evidence before the court establishing the fact that the actual cost greatly or at all, exceeded the estimated cost, said District Court having ruled and decided during the progress of the trial that it did not care to hear any evidence as to the actual cost of the project, and Section 4 of said Reclamation Act of June 17, 1902, requiring that the estimated cost and not the actual cost be repaid.

XVIII.

That said District Court erred in finding and deciding that this case is governed by the decision in the case in the U. S. District Court in and for the District of Idaho, namely, Payette-Boise Water Users' Association vs. D. W. Cole, et al., [409] for the reason that the evidence in that stated case

shows conclusively that the settlers and land owners within the Payette-Boise Project waived their rights under Section 4 of said Reclamation Act of June 17, 1902, while in this case it has not been proved, nor attempted to be proved, that the plaintiffs in this case, or any of them, waived their rights under Section 4 of said Reclamation Act to have granted to them a water right at the estimated cost of less than forty dollars per acre.

XIX.

That the said District Court erred in finding and deciding that the case of Swigart vs. Baker, 229 U. S. 187, is controlling in this case, for the reason that the questions here involved were not before the Supreme Court of the United States for decision or adjudication in that case, and anything therein decided was dictum as far as this case is concerned; and that the U. S. Supreme Court, in the Swigart-Baker case, did not pass upon or construe Sections 2, 3 and 4 of the Reclamation Act of June 17, 1902, which are involved in this case.

XX.

That said District Court erred in finding and deciding that the Secretary of the Interior did not make an estimate of the cost of the Yuma Project on May 10, 1904, and in finding and deciding that the circulation among the land owners and settlers within the Yuma Project in May, 1904, of a certain pamphlet containing letters, reports, and estimates, did not constitute a public notice within the meaning of the Reclamation Act; and in finding and deciding that the public notice was the one given

April 6, 1917; the evidence in this case conclusively showing that the Secretary of the Interior did estimate and determine the cost of the Yuma Project on May 10, 1904, and did thereafter, on May 28, 1904, and continuously until May 31, 1906, in compliance with Section 4 of the Reclamation Act of June 17, 1902, give public notice of the lands irrigable under said project, and of the charges which should be made per acre upon the entries and private [410] lands therein, together with the number of annual installments in which said charges should be paid, and the time when such payments should commence.

XXI.

That said District Court erred in finding and deciding that the testimony in this case shows that the annual net revenue per acre of the lands within the Yuma Project is almost equal to the cost per acre of the project; there being no evidence whatsoever in this case as to the rental value of any lands whatsoever within the Yuma Project, except as to one tract of land belonging to the witness Oscar P. Bondesson; such finding being against the evidence and unsupported by the evidence.

XXII.

That said District Court erred in finding and deciding that the contract of May 31, 1906, Exhibit "C" annexed to plaintiffs' complaint, and defendants' Exhibit 7, means, or should be construed as meaning and expressing, that the plaintiffs are bound thereby to pay that part of the cost of the Yuma Project attempted to be apportioned thereto by the Secretary of the Interior by the so-called public no-

tice of April 6, 1917; for the reason that said contract should be construed to have written into it the express terms of section 4 of the Reclamation Act of June 17, 1906, whereby it is prescribed that the estimated cost of the project shall be returned to the Reclamation Fund; and the evidence in this case conclusively shows that the cost of the Yuma Project was estimated and determined on May 10, 1904, by the Secretary of the Interior; and erred in finding and deciding that said contract provides by its terms that the payments to be returned to the Reclamation Fund for the construction of the Yuma Project are now due and payable; said contract providing by its express terms that the payments shall not begin until the Yuma Project is completed; and the evidence in this case conclusively showing that said Yuma Project is not yet completed. [411]

XXIII.

That said District Court erred in finding and deciding that the Yuma Project from a practical standpoint, or at all, was completed on April 6, 1917; the evidence in this case conclusively showing that said project was not completed on April 6, 1917, and that it is not now completed, and there being no evidence whatsoever proving or tending to prove that said project is completed or that it was completed April 6, 1917.

XXIV.

That said District Court erred in not passing and deciding upon plaintiffs' contention set forth in their amended pleading filed at the commencement of the trial in this case on April 28, 1919, wherein

the plaintiff association sued and contended for and on behalf of certain of its constituent members who made homestead entries subsequent to the commencement of the Yuma Project and after the lands therein had been withdrawn from all form of entry, except homestead entries, and the provisions of said Reclamation Act, and who are the owners and holders of larger areas of land embraced in said entries than would be permitted to be held by them according to the terms of the so-called public notice of April 6, 1907, defendants' exhibit 8, which attempts to reduce the holdings of said entrymen to a farm unit of the area of forty acres, or less, notwithstanding that by operation of law and the acceptance of the filing fees and commission for larger areas than forty acres, and the Secretary of the Interior permitting said entrymen to hold their said lands for long periods of years the area per entry of each and all of said entries had been fixed and determined at a greater area than forty acres; and the evidence in this case in any event shows that the Secretary of the Interior had, in the year 1910, fixed the area of farm units in said Yuma Project at eighty acres per entry; and erred in finding and deciding, in effect, against said contentions by entering its decree dismissing plaintiffs' bill. [412]

XXV.

That the United States District Court for the District of Arizona erred in adjudging and decreeing that plaintiffs' bill of complaint herein be dismissed, thereby denying the plaintiffs the equitable relief prayed for in their complaint herein, such

decree and judgment not being supported by the evidence, and being against the weight of the evidence, and being contrary to law and equity, in the following particulars, to wit:

(a) That said judgment and decree is unsupported by the evidence, and is contrary to the weight of the evidence in this, that the contract which is annexed to plaintiffs' complaint as Exhibit "C" thereto, and in evidence herein as defendants' Exhibit 7, provides, according to its express terms, that the payments for the water rights to be issued to the shareholders of the plaintiff association, under the provisions of the Reclamation Act of Congress, June 17, 1902 (32 Stat. 388), should not be begun to be made until the completion of the proposed reclamation works of the Yuma Project of the United States Reclamation Service, the subject of said contract; and the evidence in this case conclusively proves and shows that said proposed works were not completed at the time of the institution of this suit, and are not now completed; and the defendants were attempting to, at the time of the institution of this suit, and will, unless enjoined by this court, unlawfully and wrongfully compel the plaintiffs to commence making such payments prior to the completion of said proposed works, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(b) That said Reclamation Act of June 17, 1902, provides, among other things, that the charges which shall be made per acre upon lands within the United States Reclamation Projects, including the

Yuma Project, which is the subject of this suit, shall be determined with the view of returning to the Reclamation Fund the estimated cost of the construction of the project; and the evidence in this case conclusively shows that the estimated [413] cost of said Yuma Project, as fixed and determined by Secretary of the Interior in accordance with said act, is less than the sum of forty dollars per acre, and the defendants in this case were, at the time of the institution of this suit, unlawfully attempting to, and will, unless enjoined by this court, wrongfully compel the plaintiffs to pay the sum of seventy-five dollars per acre as the cost of said project, by unlawful and inequitable means, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(c) That the evidence in this case shows and proves that it was at the time of the institution of this suit, and now is, the duty of the defendants to continue to supply irrigating water to the lands of the plaintiff Archie J. Griffin, and those for whom he sues herein, situated in Tract A as described in the complaint herein; and that the defendants have unlawfully and wrongfully shut off, and refused to deliver, irrigating water onto the said lands, and will continue to shut off and refuse to deliver such water to said lands to the great and irreparable injury and damage of the plaintiff Griffin and those for whom he sues herein, and the plaintiff Yuma Water Users' Association.

(d) That the evidence in this case shows and proves that the entrymen who are constituent mem-

bers of the plaintiff Yuma County Water Users' Association, and for whom said plaintiff association is suing herein, as more particularly described and set forth in plaintiffs' amended pleading filed with leave of court on April 28, 1919, at the commencement of the trial herein, are lawfully entitled to hold the full areas of their, and each of their, respective entries, and the defendants were at the time of the institution of this suit unlawfully and wrongfully attempting to compel said entrymen to reduce each of their respective entries to forty acres in area, and the defendants will, unless enjoined by this court, continue to wrongfully and unlawfully attempt to compel said entrymen to so reduce their said entries, by wrongfully [414] and unlawfully shutting off and refusing to supply to said entrymen irrigating water for the lands embraced in their respective entries, to the great and irreparable injury of the said entrymen.

(e) That the evidence shows that the defendants were proceeding, and will proceed, unless restrained by this court, to unlawfully and wrongfully shut off irrigating water from the lands of all the plaintiffs and those for whom they sue herein to their great and irreparable injury and damage, and that in law, justice and equity the plaintiffs are entitled to the relief prayed for in their complaint; and said court erred in not granting the relief prayed for, and in not perpetually restraining and enjoining the defendants from shutting off and refusing to supply irrigating water to said

lands, and in not otherwise doing equity as prayed for.

(f) That the evidence and pleadings herein conclusively show that the defendants were, at the time of the institution of this suit, unlawfully attempting, and will, unless restrained and enjoined by this court, continue to unlawfully attempt to compel the plaintiffs, and those for whom they sue herein, to execute and deliver to them an unlawful, unconscionable and inequitable contract, which would have the effect, among other bad effects, of depriving them, and each of them, of their, and each of their, property for a public purpose without compensation and due process of law, in violation of the Constitution and laws of the United States and the State of Arizona, a copy of which contract is annexed to plaintiffs' complaint as Exhibit "D" thereto, and in evidence as defendants' exhibit 16, by threatening to shut off the supply of irrigating water from their lands, to their great and irreparable injury and damage.

XXVI.

That said District Court erred in not granting the relief prayed for in plaintiffs' complaint, for all the reasons and [415] upon all the grounds set forth in the preceding assignment of error, No. XXV, which, for the sake of brevity, are not set forth here, but to which reference is hereby prayed.

WHEREFORE, because of the errors aforesaid, the plaintiffs, and each of them, pray that the judgment and decree entered in said suit be voided, annulled and reversed, and that said District Court

of the United States for the District of Arizona be directed to enter judgment and decree awarding to the plaintiffs, and each of them, the relief prayed for in plaintiffs' complaint; or, that the United States Circuit Court of Appeal for the Ninth Circuit enter such judgment herein as it shall deem just, lawful and equitable.

THOS. D. MOLLOY,
Solicitor for Plaintiffs.

[Endorsements]: Tucson No. E–74. Yuma Co. Water Users' Asso. et al., Plaintiffs, vs. W. W. Schlecht et al., Defendants. Assignment of Errors. Filed this 25th day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [416]

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In the United States District Court, for the District of Arizona.

E–74.—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT et al.,

Defendants.

**Stipulation.**

IT IS HEREBY STIPULATED by the parties hereto that the following described portions of the record shall constitute the transcript of the record on appeal to the United States Circuit Court of Ap-

peals of the Ninth Circuit, in the above-entitled cause, to wit:

1. Plaintiffs' Amended Complaint.
2. Plaintiffs' Petition for leave to amend the Amended Complaint, filed April 28, 1919.
3. Defendants' Answer to Complaint, excepting therefrom the Exhibits "A" and "B" annexed thereto, Exhibit "A" being incorporated in the Statement of the Evidence as Defendants' Exhibit 8, and Exhibit "B" being annexed to the Amended Complaint as Exhibit "D" thereto.
4. Stipulation correcting errors in answer.
5. Stipulation dated April 28, 1919, providing that Defendants' answer shall be deemed an answer to Plaintiffs' Pleadings.
6. Plaintiffs' petition for leave to file Supplemental Complaint.
7. Statement of the evidence, as approved by the Judge.
8. Opinion of the Judge in deciding case.
9. Final decree.
10. Supersedeas order.
11. Modification of supersedeas order.
12. Supersedeas bond.
13. Plaintiffs' petition for, and notice of, appeal.
14. Plaintiffs' assignment of errors. [417]
15. This stipulation.
16. Order to transmit certain Exhibits to Appellate Court.

17. Defendants' waiver of issuance of citation.

THOS. D. MOLLOY,
Solicitor for Plaintiffs.
THOS. A. FLYNN,
OLIVER P. MORTON,
Solicitors for Defendants.

[Endorsements]: Filed this 25th day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [418]

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In the United States District Court for the District of Arizona.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT et al.,

Defendants,

**Order to Transmit Certain Exhibits to Appellate Court.**

In pursuance of the Stipulation of the parties hereto, on file herein,

IT IS HEREBY ORDERED that the following named and described Exhibits, introduced in evidence on the trial of this cause, be physically transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, for view and inspection by that Court on the appeal of said cause, to wit:

1. Plaintiffs' Exhibits Nos. 5 to 13, inclusive, being certain Township Plats.

2. Plaintiffs' Exhibit No. 26, a certain map.

3. Plaintiffs' Exhibit No. 33, a certain written report of Engineers, with Blue-print map annexed.

4. Defendants' Exhibit No. 5, a certain map.

5. Defendants' Exhibit No. 7, a certain contract dated May 31, 1906.

6. Defendants' Exhibit No 17, a certain map printed in colors.

7. Defendants' Exhibit #18, a certain Blue-print.

Done in open court this 25th day of August, 1920.

WM. H. SAWTELLE,
Judge of said Court.

[Endorsement]: Filed this 25 day of August, 1920. C. R. McFall, Clerk. By J. Lee Baker, Deputy. [419]

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In the U. S. District Court for the District of Arizona.

TUCSON E.—74

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants,

**Waiver of Citation.**

The above-named defendants hereby waive the issuance and service of a Citation on Appeal in the

above-entitled case, and hereby undertake and agree to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California, in the October, 1920, Term thereof, and show cause to said Appellate Court why the decree rendered against plaintiffs (Appellants in said Appellate Court), as set forth in their petition for appeal and their Assignment of Errors herein, should not be voided, annulled or reversed, changed or modified, as prayed for by said Appellants.

(THOS. A. FLYNN)
THOS. A. FLYNN,
(OLIVER P. MORTON)
OLIVER P. MORTON,
Solicitors for Defendants.

[Endorsement]: Filed August 25, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [420]

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In the United States District Court for the District of Arizona.

E.–74—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION et al.,

Plaintiffs,

vs.

W. W. SCHLECHT et al.,

Defendants.

**Order Enlarging Time to and Including October 25, 1920, to File Record and Docket Case.**

It appearing to the Court that, by reason of the size of the record in this case and the time necessary to prepare a transcript thereof, the clerk of this Court will be unable to prepare the same and return and file the record with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the 25th day of September, 1920.

Now, therefore, for good cause shown, it is ordered that the time to file the record in this case, and to docket this case with the Clerk of said Circuit Court of Appeals, and otherwise perfect this appeal, be and the same is hereby enlarged and extended until and including October 25, 1920.

Dated at Tucson, Arizona, this 24th day of September, 1920.

WM. H. SAWTELLE,
District Judge.

[Endorsement]: Filed September 24, 1920. C. R. McFall, Clerk. By J. L. Baker, Deputy Clerk. [421]

In the United States District Court for the District of Arizona.

E.-74—TUCSON.

YUMA COUNTY WATER USERS' ASSOCIATION et al.

vs.

W. W. SCHLECHT et al.

**Order Enlarging Time to and Including December 1, 1920, to File Record and Docket Case.**

It appearing to the Court that, by reason of the size of the record in this case and the time necessary to prepare a transcript thereof, the clerk of this Court will be unable to prepare the same and return and file the record with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the 25th day of October, 1920.

Now, therefore, for good cause shown, it is ordered that the time to file the record in this case, and to docket this case with the Clerk of said Court of Appeals and otherwise perfect this appeal, be and the same is hereby enlarged and extended until and including December 1, 1920.

Dated at Tucson, Arizona, this 23d day of October, 1920.

WM. H. SAWTELLE,
District Judge.

[Endorsement]: Filed Oct. 23, 1920. C. R. McFall, Clerk. [422]

In the United States District Court for the District of Arizona.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, and RALPH THURMAN, and ARCHIE J. GRIFFIN,

Plaintiffs,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court of Arizona, including the records, papers and files in the case of Yuma County Water Users' Association et al., vs. W. W. Schlecht and David C. Caylor, said case being number Equity—74, Tucson, on the docket of said Court.

I further certify that the foregoing 423 pages numbered from 1 to 423, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the stipulations filed in said cause and made a part of this transcript as

the same appears from the originals of record and on file in my office as such clerk.

I further certify that the cost of preparing and certifying to said record, amounting to one hundred seventy-six and 30/100 dollars ($176.30), has been paid to me by the plaintiffs, (Appellants).

Witness my hand and the seal of said Court, this 25th day of October, 1920.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona. [423]

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[Endorsed]: No. 3593. United States Circuit Court of Appeals for the Ninth Circuit. Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan and Ralph Thurman, and Archie J. Griffin, Appellants, vs. W. W. Schlecht and David C. Caylor, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed October 29, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. Donovan, and Ralph Thurman and Archie J. Griffin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

PROCEEDING HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Thomas D. Molloy, Yuma, Arizona, Solicitor for Appellants.
Oliver P. Morton, Special Assistant Attorney General, Los Angeles, California, Solicitor for Appellees.

At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Friday, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty-one.

Present:
Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William H. Hunt, Circuit Judge.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION et al., Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Order of Submission.*

Ordered appeal in the above entitled cause argued by Mr. Thomas D. Molloy, counsel for the appellants, and by Mr. Oliver P. Morton, Special Assistant to the Attorney General, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the seventh day of November, in the year of our Lord one thousand nine hundred and twenty-one.

Present:
Honorable William H. Hunt, Circuit Judge, Presiding.
Honorable Frank H. Rudkin, District Judge.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEI MANN, J. A. Donovan, and Ralph Thurman and Archie J Griffin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Order Directing Filing of Opinion and Filing and Recording Decree.*

By direction of the Honorable William B. Gilbert, Erskine M Ross and William H. Hunt, Circuit Judges, before whom the cau was heard, ordered that the typewritten opinion this day rendere by this Court in the above-entitled cause be forthwith filed by th Clerk, and that a Decree be filed and recorded in the Minutes of th Court, in accordance with said opinion.

In the United States Circuit Court of Appeals for the Ninth Circui

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEI MANN, J. A. Donovan, and Ralph Thurman and Archie J. Gri fin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

Upon Appeal from the United States District Court for the Distri of Arizona.

Before Gilbert, Ross, and Hunt, Circuit Judges.

HUNT, *Judge:*

This is an appeal from a decree dismissing a bill asking an i junction against appellees, local officers of the Yuma project of th United States Reclamation service. The Yuma County Water Use Association is an Arizona corporation, and other appellants are mem bers of the water users' association and land owners within the di trict over which the association exercises authority.

The complaint alleges: That in May, 1904, the Secretary of th Interior contracted for the construction of the Laguna dam acro the Colorado River, and determined and estimated the cost of th construction of the Yuma project, and gave public notice of th charges which should be made per acre upon all the lands withi the irrigation district and Yuma project to be developed for th construction cost of the project exclusive of the cost of operation an maintenance; that $35.28 was determined upon with a view of r

turning to the fund created by the Reclamation Act the estimated cost of the project; that the Secretary set aside three million dollars from the fund furnished by the Reclamation Act for the construction of the Yuma project, and gave public notice of the lands irrigable under the Yuma project, as well as the number of annual installments within which charges should be paid and the time when payment should commence; that the Yuma County Water Users Association was organized under the direction of the Secretary of the Interior for the purpose of securing the aid of the United States in the construction of the irrigation project, and for the collection and payment to the United States of moneys which might be due for the use of water from any irrigation works, to be constructed under the provisions of the Reclamation Act under a plan approved by the Secretary and prescribed by the articles of incorporation of the Water Users Association. The shareholders in the association pledged their respective tracts of land as security for the payment of the estimated costs and charges of any irrigation project which might be constructed by the United States for the irrigation of the lands in the district, and it is alleged that in May, 1907, relying upon the estimate of $35.28 and on what was said by certain officials of the Reclamation service, that the Yuma project would be completed at the estimated cost and within two years from the commencement of the work, plaintiffs were induced to mortgage their lands and to become shareholders; that on May 31, 1906 the association for itself and the shareholders agreed with the United States through the Secretary of the Interior that the estimated cost of the Yuma project should be divided into not less than ten annual payments; that the association would collect from its shareholders the amount of the cost of the project. It is alleged that the corporation performed, but that notwithstanding the estimate and determination of the Secretary, and the promises by the engineers of the United States, and notwithstanding the agreement of 1906, the project has not been completed and large portions of tracts have been left in desert condition; that defendants, with the intention of compelling the shareholders in the Yuma County Water Users Association to make a contract whereby they would agree to pay into the reclamation fund for the cost of expense of the Yuma project, exclusive of the cost of operation and maintenance $75.00 per acre, threaten that unless they made such payment the defendants will shut off the water; that the contract proposed is inequitable and unconscionable in that it will compel each signer to agree to pay $75.00 per acre for each acre of irrigable land notwithstanding the estimates of the Secretary, and that such amount is greatly in excess of the actual value of work constructed or to be constructed in the Yuma project.

The principal points upon which decision must turn relate to the public notice required to be issued by the Secretary of the Interior, and the matter which it should contain, especially as to the amount of the cost. The formal notice dated April 6, 1917 was issued pursuant to section 4 of the Reclamation Act of June 17, 1802, (32 Stat. 388), and the amendments thereto, and the extension act of

August 13, 1914, (38 Stat. 686). It specified certain lands for which water would be furnished under the project; gave notice that all water right applications must be made to the project manager; specified the classes of charges for water rights, which included a charge against each irrigable acre "to cover the cost of construction of the irrigation system called the construction charge," and an annual charge against each irrigable acre "to cover the cost of operation and maintenance of the system called the operation and maintenance charge;" specified "the construction charge for the unit as $75.00 per acre of irrigable land" payable in installations which are enumerated.

Section 4 of the Reclamation Act gives authority to the Secretary of the Interior, after determining that an irrigation project is practicable, to cause to be let, contracts for the construction work in such portions or sections as it may be practicable to construct and complete as parts of the whole project, provided funds are available in the reclamation fund, and thereupon to give public notice of the lands irrigable under the project, of the charges which shall be made per acre upon entries, and upon lands in private ownership capable of being irrigated and the number of annual installments in which the charges shall be paid. The section continues:

"The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of the project, and shall be apportioned equitably, and provided, etc."

The notice given was in clear accord with the statute and presumably was based upon data and information then at hand. By estimated cost is not meant the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project. The statute contemplates that contracts shall be let prior to the giving of the public notice, and the obvious reason for this is to give to the Secretary of the Interior an adequate knowledge upon which to make an estimate.

Correspondence such as there was in the present case between the Secretary and officials of the Reclamation service wherein estimates are considered and discussed in laying out the work prior to the date of the contract between the land owners and the United States cannot be regarded as a public notice nor as in any way binding upon the Government. Utah Light & Power Co. v. United States, 243 U. S. 389. As the whole theory of the statute is that there shall be a return to the reclamation fund of the estimated cost of constructing the project, manifestly the United States should not be bound by letters or statements published antecedent to plain agreements made pursuant to the statute. It is unfortunate that in the Yuma project there was a substantial and material difference between preliminary engineering estimates and the estimate which was made at a later time; but in the absence of some substantial showing that the action of the Secretary was fraudulent or arbitrary or so erroneous as to justify an inference of illegality or wrong doing, it is not within the province of the courts to interfere. Noble vs.

nion R. Logging Co., 147 U. S. 165; Swigert vs. Baker, 229 U. S. 87; N. Y. Canal Co. vs. Bard, 265 Fed. 228.

It is not out of place to say that the increased cost as explained by the Chief Engineer Davis of the Reclamation service was because of the unexpected difficulty in managing the rivers, rapid increase in price of labor, change of engineering plans by substituting a siphon under the Colorado for one under the Gila river, increasing mileage of canals, and other important modifications of originally conceived plans.

Moreover, the contract between the United States by the Secretary of the Interior, and the Water Users Association provides that the Association will promptly collect or require payment for that part of the cost of the works which shall be apportioned by the Secretary to its shareholders; also that payments for the water rights would be made and enforced by proper means. The fact, therefore, that the cost is greater than was expected cannot be urged now as a ground for equitable relief. Kihlberg vs. United States, 97 U. S. 398.

There is no real importance to the point that the system was not completed when this suit was filed. The public notice and the letters of the Secretary of the Interior to the Association are based upon his determination that the project was completed. His determination was based upon investigation into facts and found support in the opinion of an experienced engineer, and we think that in withdrawing certain lands and confining the project to the area described in the public notice, the Secretary but exercised discretion and power vested in him under the law.

We cannot find that appellants have made any showing which entitles them to relief.

The judgment is affirmed.

Endorsed: Opinion. Filed Nov. 7, 1921. F. D. Monckton, Clerk. by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS ASSOCIATION, ROBERT H. THEILMANN, J. A. Donovan, and Ralph Thurman and Archie J. Griffin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

Appeal from the District Court of the United States for the District of Arizona.

*Decree.*

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed with costs in favor of the appellees and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[Endorsed:] Decree. Filed and Entered November 7, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION et al., Appellants,

vs.

W. W. SCHLECHT et al., Appellees.

*Motion for Supersedeas Order and Injunction Pending Appeal.*

Come now the above-named Appellants, and move and pray the above-entitled Court that it make and enter its order superseding and suspending the judgment and decree of the U. S. District Court for the District of Arizona, as affirmed by this Court in its Decision and Opinion rendered and filed herein on Nov. 7, 1921; and that an Injunction be issued herein, pending Appeal to from said Decree and Judgment to the Supreme Court of the United States (which said Appellants have taken, or are about to take) restraining and enjoining the defendants and appellees from shutting off irrigation waters from the lands of the Appellants and the constitutent members of Yuma County Water Users' Association situate within the Second Unit of Yuma Project of the U. S. R. S., upon the same terms and conditions as set forth in the Supersedeas Order of said District Court, dated Feb. 26, 1920; a copy of which said Order appears at pages 566 et seq. in the Transcript of Record herein; and that such Order and Injunction remain in force for the period of sixty days from and after the filing of the decision of the Supreme Court of the United States on said appeal.

Appellants offer in support of this motion the following affidavit.

THOS. D. MOLLOY,
*Solicitor for Appellants.*

*Affidavit.*

STATE OF ARIZONA,
*County of Yuma, ss:*

Thos. D. Molloy, being first duly sworn, deposes and says: That he is attorney for Appellants, is a landowner within the Second Unit of the Yuma Project of the K. U. S. R. S., and is familiar with the

financial condition of the Banks, the farmers and the landowners within said Project.

That affiant, in accordance with the authorization and direction of his said Clients, and all of them, is now engaged in preparing the necessary and proper papers and instruments in order to properly and timely perfect an Appeal to the Supreme Court of the United States from the Decision of this Court, rendered and filed herein on Nov. 7, 1921; and, in good faith, expects to, and will, present such appeal to this Court, or one of its Judges, for allowance at, or prior to, the time of the hearing of the within and foregoing motion.

That at the time of the rendering and entering of the Decree of the U. S. District Court for the District of Arizona herein, on Feb. 26, 1920, short-staple cotton, the principal product of the lands herein involved, was selling at from 45¢ to 51¢ per lb. and money was plentiful, and all the farmers and landowners within said Unit of said Project were prosperous, and could easily and readily borrow money from the Banks within said Project, all of which were plentiful- supplied with money to be loaned; that at this time money is scarce within said projects and the Banks within the same have not sufficient moneys with which to finance the growing of the crops with said Second Unit of said Project for the year 1922; and were without money to adequately finance the growing of the crop with said Unit for the year 1921, for which reason the cotton crop of 1921 was reduced to about 8,000 bales, as compared with about 24,000 bales for the year 1920.

That, as affiant is informed and believes, that if the Supersedeas Order and Injunction of said District Court is not kept in force by the Order of this Court, as prayed for, that it will be impossible for the landowners and farmers within said Unit of said Project to meet the Construction charges of $75 as determined by the Public Notice of April 6, 1917, and many thousands of acres of land will lie fallen and barren during the year 1922, at least, for the reason that it will be impossible to raise moneys to meet the payments thereof.

THOS. D. MOLLOY.

Subscribed and sworn to before me this 14th day of Nov. 1921.

A. H. McCLURE,
*Notary Public.*

*Notice of Motion.*

To the above-named appellees and their solicitors:

You and each of you are hereby notified that the Appellants will urge the above motion to the above-entitled Court, at the Court Room in the Post Office Building, in the City of San Francisco, California, on Monday Nov. 21, 1921, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard.

THOS. D. MOLLOY,
*Solicitor for Appellants.*

STATE OF ARIZONA,
*County of Yuma, ss:*

Thos. D. Molloy, being first duly sworn, deposes and says: That he served the within and foregoing Motion, and Notice thereof, upon the Appellees by enclosing copies thereof in an envelope, addressed to Oliver P. Morton, Attorney at Law, 600 Kirckhoff Bldg., Los Angeles, Calif., and deposited the same in the U. S. Post Office at Yuma, Arizona, on Nov. 14, 1921; the said Oliver P. Morton being the leading Solicitor for Appellees, and said address the present business address of said Morton; and that in the due course of the mails he will receive the same on the morning of Nov. 15, 1921.

THOS. D. MOLLOY.

Subscribed & Sworn to before me, Nov. 14, 1921.
A. H. McCLURE, [SEAL.]
*Notary Public.*

[Endorsed:] Motion for injunction pending appeal to U. S. Supreme Court. Filed November 16, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. Donovan, Ralph Thurman, and Archie J. Griffin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Notice of and Petition for Appeal to the Supreme Court of the United States.*

To the Circuit Court of Appeals of the United States for the Ninth Circuit or any Judge thereof:

The above-named appellants, and each of them, feeling aggrieved by the judgment and decree of said Circuit Court of Appeals rendered and entered in the above-entitled cause on November 7th, 1921, do hereby appeal from said Judgment and Decree, and all thereof, to the Supreme Court of the United States: for the reasons set forth in the assignment of errors accompanying this petition and filed herewith: and they, and each of them, pray that their appeal be allowed, and that citation (unless waived by the appellees), be issued as provided by law, and that a transcript of the record of the proceedings and documents upon which said Judgment and Decree was based, duly authenticated, be sent to said Supreme Court as under the Rules of said Court made and provided, upon the appellants

filing the supersedeas bond as fixed by said Court or any Judge thereof.

Dated, November 21, 1921.

(Sgd.) THOS. D. MOLLOY.

The above appeal is allowed, upon the giving of a supersedeas bond, in the sum of $10,000.00.

(Sgd.) WM. H. HUNT,
*Circuit Judge of said Court.*

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. Donovan, Ralph Thurman, and Archie J. Griffin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Assignment of Errors.*

Come now the above-named appellants, Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin, and each of them, and say that the Decision, Judgment and Decree of said Circuit Court of Appeals, rendered, filed and entered on Nov. 7, 1921, is erroneous and unjust to said appellants, and that in the record and proceedings in said cause there is manifest error committed by said Circuit Court of Appeals and the U. S. District Court for the District of Arizona; and said appellants make and file this their Assignment of Errors upon which they will rely upon the prosecution of their appeal herein to the Supreme Court of the United States, to-wit:

First.

Appellants charge and allege that the United States Circuit Court of Appeals, for the Ninth Circuit erred in affirming the Judgment and Decree of the United States District Court for the District of Arizona, for the reason that said District Court committed manifest error in the Trial of said cause and in rendering and entering its judgment and decree in said cause, to-wit:

1.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Oscar P. Bondesson: (Trans. Rec. pp. 290 to 296.)

"I farmed all the area of the land, and I grew alfalfa and grain crops, such as feterita, barley and cotton. My place is now rented.

"I rent my land for $30 cash per acre per year, and the lessee pays for the maintenance charge. I get for the rent of the land itself, and if there are any construction charges I pay them, but not the annual maintenance. I pay also my dues to the Water Users, which are nominal, very small, and taxes, annually. I am not paying a construction charge at the present time, as I am one of those who took advantage of the situation and made a temporary application for water service pending the determination of this suit."

"1916 was a year of large prices for produce. Cotton was beginning to be a pretty good price. As I remember it, I pastured my alfalfa lands in 1916, and received a gross revenue of close to thirty dollars per acre. That was gross.

"That was as to alfalfa, about one hundred acres or less was in alfalfa that year, and it brought me, as I remember it now, a little less than thirty dollars. It was pastured throughout the year to cattle.

"I am familiar with the regulations and actions of the Reclamation Service in securing crop returns every year; they used to come around for that purpose. I don't remember of having made any directly to them for the last two or three years, however, but I do remember that, say, three or four years ago they used to come around for that purpose. The water master used to come and ask about these things generally. I think that once or twice I made out those returns upon the regular card and furnished them to them. The card that you show me discloses that it is my card and in my handwriting, and that the returns for my land per acre for the year 1916, according to this card, was practically thirty dollars per acre for the alfalfa in round figures. There were sixty acres of cotton and seed. The gross return is shown to be $8,640 for cotton, $1,400 for cotton seed; in round numbers $10,000 for the sixty acres, gross return. The entire ranch would be a gross return of $13,000. The average value per acre stated to be $81.50.

"I do not recall the figures for the returns upon my place for the year 1917, but it was as large as that, if not a little more. 1917 was an exceptionally good year on account of high prices, and in 1918 I received thirty dollars an acre rent. It was rented in 1918 and is now rented; the entire 160 acres for thirty dollars per acre for 1918 and for this year. The lease runs for three years, which is practically net to me, except taxes, interest on the investment and that sort of thing. I have no figures for the year 1915. The returns were very much less, however, than in 1916. In 1915 prices were just beginning to advance. I had no cotton in 1915, and that has been the big money crop really. I had alfalfa and grain crops, but it was a paying proposition in that year"

for the reason that all of said testimony was irrelevant and immaterial, and not proper cross-examination, and the nature and extent of the crops raised or not raised by the witness Bondesson in the years 1915-16-17-18 on his land within the Yuma Project, and whether or not such crops, if any, were raised at a profit or at a loss, and whether or not the witness Bondesson rented his said land for the

years 1918, 1919 and 1920 at the sum of thirty dollars an acre, net, or whether he rented it at all, or not, could not, and did not, throw any light upon the questions involved in this case and the issues set forth in the pleadings, and did not tend to prove or disprove whether or not the Secretary of the Interior in the year 1904 made examinations and surveys for the location and construction of the Yuma Project; and whether or not said secretary determined that the Yuma Project was practical, and let contracts for the construction of the same; and whether or not he gave public notice as required by Section 4 of the Irrigation Act of June 17, 1902; and whether or not he estimated and determined at that time the cost of said Yuma Project and that such testimony could not, and did not, tend to prove or disprove whether or not the contract of May 31, 1906, annexed to plaintiff's complaint as Exhibit C, and introduced in evidence as defendants' Exhibit 7, was ambiguous; and did not tend to prove or disprove whether the project or the proposed works mentioned in said contract was completed April 6, 1917, or at the time of the trial; and for the further reason that the questions drawing forth said testimony were not proper cross-examination, the witness not having been interrogated by the plaintiffs as to any time or circumstances later than the year 1906, and said witness not having been interrogated as to what, if any, disposition he had made of his lands in the years 1915, 1916, 1917 and 1918, or at all; to all of which ruling of the Court in overruling plaintiffs' objection to said testimony and in admitting the same plaintiffs duly excepted to at the time.

2.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Oscar P. Bondesson (Rec. pp. 301-2):

Land had a value at that time of—well, it would depend on what state of cultivation it was in, or whether it was clear or level. I would say raw land at that time was worth about around twenty-five dollars up. As to cleared land it would depend upon the amount of labor that had been expended on it. Raw, unimproved land was worth right around twenty-five dollars and up on May 28, 1904.

for the reason that the value of lands within the Yuma Project on May 28, 1904, or whether they had any value at all, or not, was irrelevant and immaterial, and did not tend to prove or disprove any issues in this case, and the questions drawing forth said testimony were not proper cross-examination, for the reason that plaintiffs had not interrogated said witness as to the value of his lands, or any other lands, within the Yuma Project in the year 1904; and for all the other reasons set forth in the preceding Division No. I, which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said Division No. I, for a statement of said objections and wherein the Court erred in admitting the testimony set forth in this assignment of error; to which ruling

of the Court in overruling the plaintiffs' objection to admitting said testimony, the plaintiffs duly excepted at the time.

3.

That said District Court erred in not granting plaintiffs' motion to strike all the testimony of the witness Bondesson set forth in the two preceding Divisions Nos. 1 and 2, for the reason and upon all the grounds set forth in the two preceding Divisions, Nos. 1 and 2, which are hereby referred to and made a part of this Division, said grounds and reasons not being set forth here in full for the sake of brevity; and it is prayed that reference may be had to said Divisions for the reasons in support of this Division; that plaintiffs now except to the refusal and failure to strike said testimony from the record plaintiffs' said motion to strike not being passed upon during the trial of this case, or at all, except in effect by the final decree dismissing plaintiffs' bill of complaint.

4.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, (Rec. 369-71) to-wit:

"Mr. Molloy: The plaintiffs offer to prove, and hereby avow their readiness and ability to prove by the testimony of numerous witnesses to the number of at least twenty, in addition to the testimonies of plaintiffs' witnesses hereto examined, that plaintiffs' exhibit 15 for identification, the certain pamphlet testified to by the plaintiffs' witnesses heretofore examined, was generally circulated amongst all of the landowners within the Lower Colorado Irrigation District on May 28th, 1904, and continuously thereafter until ninety-eight per centum of all of the land within the Lower Colorado Irrigation District had executed subscriptions for the capital stock of the plaintiff corporation by executing, acknowledging and delivering, each of them, an instrument similar in tenor and effect to the sample form thereof offered in evidence as plaintiffs' exhibit 14; and that at the mass meeting held in the town of Yuma, Arizona, on the night of May 28th, 1904, testified to by plaintiffs' witnesses heretofore examined, F. H. Newell, Chief Engineer of the U. S. Geological Survey, and J. B. Lippincott, Supervising Engineer of U. S. Geological Survey, and each of them, stated and represented to the landowners assembled at said mass meeting, that they, the said Newell and the said Lippincott, and each of them, represented and there spoke for and on behalf of the Secretary of the Interior of the United States of America, and that the written statements and representations set forth in said exhibit 15 and the plat and drawings annexed thereto, were true and correct and could be relied upon, and that the Yuma Project as therein described and thereon delineated could and would be constructed, as a whole, within two

years from the actual commencement of work thereon, at a cost of not to exceed $35.00 per acre, and possibly less, and that they, and each of them, the said Newell and the said Lippincott, would pledge, and did then and there pledge, their professional reputations as engineers, such as it was, that said project could be and would be so constructed within said time, and at said cost; and that each and all of said proffered witnesses, and each and all of the landowners present at said mass meeting believed in and relied upon the statements so made by these said engineers, and relied upon the statements, representations and delineations contained in said pamphlet, and the said land owners, and the said proffered witnesses, and each of them, were thereby induced to, and did, execute, acknowledge and deliver to Yuma County Water Users' Association, the plaintiff corporation, their subscriptions for stock identical with plaintiffs' exhibit 14, thereby placing a lien upon their land to secure the payment of the estimated cost of said project; and that if said witnesses, or said landowners, or either of them, had known or could have foreseen that the cost of said project would have exceeded the sum of $35.00 per acre, or, at the extreme outside, the sum of $40.00 per acre, and that said project would not be completed within two years from the time of commencement of work thereon, that they would not, nor would either of them, have executed or delivered said stock subscription agreements."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. 504-5.)

5.

That said District Court erred in rejecting the followin- evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence (Rec. 371-2), to-wit:

"Mr. Molloy: The plaintiffs' offer to prove, and hereby avow their readiness and ability to prove by the testimonies of numerous witnesses, not less than twenty-five, that the charge of $75.00 per acre provided for in the so-called public notice of April 6, 1917, concerning said Yuma Project, an unjust and inequitable burden upon the lands within said Yuma Project, and the owners thereof, and that said owners cannot afford to pay such charges, the same being more than said lands will bear, one year with another, taken over the period of time provided for the payment of the annual installments of the construction charge of said project; and that the same is, and will be, excessive, unjust and grossly exorbitant, and out of all proportion to, and greatly in excess of the actual value of the works constructed, or to be constructed, in said Yuma Project, for the irrigation and reclamation of said land; and that the charge of the sum of $1.50 per annum, for each acre of the land within Tract C, as described in the complaint, as a minimum operation and

maintenance charge is, and will be inequitable, unjust, illegal, arbitrary, excessive and unreasonable and greatly in excess of the reasonable cost of the operation and maintenance of said project."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. 504-5.)

6.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, to-wit:

"Mr. Molloy: Plaintiffs' offer to prove that there is within the limits of said Lower Colorado Irrigation District, as described in the complaint, some six thousand acres of land which was, on May 10, 1904, in private ownership, although within the exterior limits of certain withdrawals under the second form of withdrawal, according to the provisions of Reclamation Act of June 17, 1902, and of which said lands were thereafter, and prior to the commencement of this suit, relinquished to the United States and re-entered by homestead claimants under said Act, in tracts of 160 acres, and of other areas greater than 40 acres, for which the Register and Receiver of the Phœnix, Arizona, land office, received and accepted the fees required by law for the entry as homesteads and of said respective tracts so re-entered, and that said new entrymen have been permitted by the Secretary of the Interior to hold all of the areas so re-entered as homesteads without diminution or confirmation to a farm unit for a great number of years in each of said respective cases, to-wit: The period of ten years, including John W. Hevener and his homestead entry for the northwest quarter of Section 17, Township 10 south, Range 24 west, G. & S. R. Meridian, in Yuma County, Arizona, and many others similarly situated to said Havener."

to which said ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. p. 504-5.)

7.

That said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Arthur P. Davis. (Trans. Rec. 379 to 385.)

"Briefly, the reasons for the additional cost of the project were three: The first is the unexpected conditions that developed as to poor rock and some other physical conditions; the difficulty in dealing with the rivers which were then not so well known as now, and other minor physicial difficulties. Second, the change in industrial conditions which was very important. There was a very rapid in-

crease in the price of labor, price of material, and especially in the scarcity of efficient labor. That was one of the chief difficulties the contractor had which led almost to his ruin and calamity in October, 1907, when there was an industrial collapse. It had been greatly hastened by the destruction of San Francisco, which in its building in 1906 and 1907 absorbed building materials and labor which affected greatly the western part of the country. The conditions were generally changed, the plans were changed in order to make a better project and more endurable project, one of the features being substitution of the siphon under the Colorado River for one under the Gila, which was decided upon for the reasons there were very grave doubts of maintaining such a crossing on the Gila River The original plans provided that the main canal which was to serve the entire Arizona side of the project, including the Lower Yuma Valley, should be built on the Arizona side and it involved a crossing of the Gila River and a large mileage of the canal in the valley of the Gila River where it might be attacked by that stream when in flood, and if reached would deprive the entire lower valley and a portion of the upper valley of any water for irrigation and in a high, arid climate of this kind that was a very serious jeopardy. Largely to avoid that jeopardy the crossing plans were changed and the main canal was finally built on the California side and the portion to water the lower Gila Valley was brought through a siphon under the Colorado River just below the city of Yuma. Another change was that a very much larger mileage of canals was built than was shown on the plat which has been placed in evidence here; approximately, I think, four times the mileage, although the increased mileage was of small conveyance merely. And it is those canals that contain a large number of small wooden structures. The main structures on the Yuma Project being of a permanent nature. That policy is one which we have developed with the experience of surveys, and observations of other works, as being the wise one. Technically there was no change in hours of labor.

The law was not changed. The original Reclamation Act contains a paragraph requiring eight hours to constitute a day's labor for a common labor—labor of mechanics, but it was a practice in those days for contractors to make agreements with their men and work them ten hours and they probably made their bids on that basis. At any rate that was the practice and J. G. White & Company began that practice and carried it on for some time and were arrested by the local authorities and I understood paid a fine and had to discontinue it and work men eight hours. They had great difficulty in securing labor which was one of the strongest items involved in the increased cost of the Laguna Dam, and another cause the increased difficulty of navigating the Colorado River. The contractors began, I believe, first to do some freighting on the Arizona side and found that the Gila River interrupted his traffic frequently, or for other reasons he changed to the river for navigation, but the Colorado River broke into Imperial Valley and began cutting its channel very rapidly and the effect of that cutting reached back well into the Yuma Valley. I mean cutting the bottom lower and lower.

The river in its former position reached sea level and at the Gulf of California, something over a hundred miles below Yuma, and by changing in approximately the same distance or perhaps a less distance, reached an elevation practically two hundred and fifty feet lower than sea level, so that it had a very great declivity. It cut great, deep gorges through the Imperial Valley and caused cataracts which were undermined by the high velocity causing deep gorges. The effects of that reached up, I don't know how far, but above the city of Yuma. I know that from my experience in navigating the Colorado River. Prior to that cutting the Colorado River was being navigated to the Laguna Dam and above, after the cutting I found it impossible to so navigate it. It formed a series of rapids which prevented the passing of the boats. I know for I was on a boat with a good pilot that could not pass, and we spent many hours there. That and other difficulties led to the abandonment of the navigation of the river and to the construction of a wagon road on the California side by which considerable freight was hauled to the dam. Those three methods, a road on the Arizona side, navigation of the river and a road on the Colorado side, were the methods that had been used for freighting to the dam during the pendency of the work of the contractor—during the progress of the work of the contractor at the Laguna Dam. There was no railroad constructed by the contractor. When the Government took over project upon the failure of the contractor, the experience therefore had by him demonstrated that those methods of transportation were not only enormously expensive but ineffective, and had contributed largely to his loss and at last it was decided that a railroad must be built and such a railroad was built under the auspices of the Government. That railroad is in existence and is used for occasional travel, for hauling rock from the Colorado River to the dam and maintenance of levees in the lower valley and upper valley, also for taking such material as required to the Laguna Dam.

The effect of all these things was to greatly increase the cost of the dam under any management, irrespective of the cost of management. Other portions of the project were affected in the same way:

for the reason and upon the ground that it was irrelevant and immaterial what the actual cost of the Yuma Project was, or should have been, the Secretary of the Interior having, in the year 1904, under the provisions of the Reclamation Act of July 17, 1902 (32 Stats. 388), determined the estimated cost of the Yuma Project, and said act providing that such estimated cost and not the actual cost should be returned to the Reclamation Fund, and it will now be inequitable and wrongful, after the plaintiffs in this case, and those for whom they sue herein, have mortgaged their lands to secure the payment of the estimated cost, as so fixed and determined by the Secretary of the Interior, and not the actual cost, to permit the defendants, thirteen years after the cost of the Yuma Project has been estimated according to law to levy on the lands of the plaintiffs, and those for whom they sue, a charge of more than double

he estimated cost; to which ruling of the Court in overruling plaintiffs' objections to said testimony and in admitting said testimony he plaintiffs duly excepted at the time.

8.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Arthur P. Davis: (Trans. Rec. 385-391.)

At the time of the meeting of May 28th, 1904, there were no surveys or locations of anything that anybody regarded as permanent. There were approximate locations of some features. The principal feature of that character being the Laguna Dam, but even that was subject to change, not only in location but design, and was subsequently changed in design and I think in location. There was not at the time a definite determination of the irrigable area in Lower Colorado Irrigation District.

It was the area in which we were endeavoring to work out and had tentatively worked out a feasible irrigation project in which we had made an attempt to approximate the acreage that could be covered and the works that would be necessary for that and their probable cost.

Since May 31, 1906, the irrigable area of the project has been determined approximately.

The area of the so-called north and south Gila Valleys, also referred to in the complaint as Tracts A and B of the Lower Colorado Irrigation District, were withdrawn from entry in the early days, but have since been restored to entry, the purpose of the withdrawal was to prevent prior entry before the proper time, pending examination and the determination of the feasibility of the project and the final action even if not feasible. The purpose of the restoration was the last step in the abandonment of that part of the project as far as irrigation was concerned by this project.

The Court: In other words, when you determined it was not practical to irrigate they were restored to entry?

Witness: Not immediately. It is a custom of the Irrigation Service to not restore lands while there may be danger of people being misled into filing upon the land and we have frequently held lands beyond the time of the actual needs of the act for that reason.

The Court: In any event you determined it was not feasible to include them within the project?

A. Yes, and that was the purpose of the restoration, the reason for it.

As to the North and South Gila:

This map has upon it in dotted lines the course pursued at various times by the Colorado River and the Gila River. That color in yellow shows the course of the Colorado River in 1903 and the course of the Gila River along the lower line. The red line indicates the boundary and the course of the Colorado River in the upper part and the Gila River in the lower part of 1907; and the various dotted lines

show the various peregrinations and meanderings of the rivers in the early days. Now this shows that in 1903 the Colorado River ran along the yellow line which is far to the north of where it afterwards came and by its cutting to the southward, it cut off the land which has been intended to be occupied by levees and the canals. At the same time the meanderings of the Gila River showed its erratic disposition and also the Gila was a much more difficult river to control than the Colorado for the reason the Colorado rises slowly and gives warning. That is not true of the Gila. It also in extreme floods discharges more water and at a higher velocity than the Colorado. For those reasons it is far harder to control the Gila than the Colorado. That is the principal reason for this change. Another is——

The Court: Where is that land in question?

A. It is this area in here (indicating on map).

The Court: Omitted from the project?

A. Between this river and the Yuma mesa (indicating on map).

The Court: You were asked to state why it was not practical to include that in the project as originally planned.

A. One reason is the impracticability of controlling the Gila River by means of levees. Without levees these valleys will all overflow and their cultivation will be so precarious that we don't consider it feasible for the part nearest the river. Some of the higher lands may be cultivated but only a very small area for the same reason of the erratic condition and impracticability of controlling the Gila River within the limits of expense, which made it necessary to bring the main canal of the Yuma Project down the river from the Laguna Dam.

Removing the main canal to the western side of the river, or the location of it before the construction, and crossing the Colorado River was due largely to this impracticability of controlling the Gila River so not to wipe out the crossing.

The Court: Was it ever contemplated that you would control either one of these rivers with levees?

A. Yes. Levees have been built in the valleys and this levee on the eastern bank of the Colorado is still in existence.

The Court: Do you mean the levees here (indicating on map)?

A. In a general way it is parallel with the river, but the original location of that levee has been obliterated and the present course is shown on the map and marked "Levee."

The Court: This levee here along the red line?

A. No, the levee is along the Gila land shown on this map. Every time that river goes in flood it changes some part of its course and frequently very radically. Now, the removal of the main canal to the west side of the river which was necessitated by the erratic habits of the Gila River, made it impossible to cover by gravity as large an area for the reason that a canal with very large discharge requires much less grade than a canal of small discharge so that a canal on the smallest practical grade and with a capacity proper for the irrigation of irrigable land in the Gila Valley follows a course roughly parallel, but lower than the original main canal and crosses the Gila river in the neighborhood of Sections 16 and 21. I have another

map with the course sketched; that blue line (indicating on map). The blue line on this map shows the approximate location of the canal headed at the Laguna Dam carrying sufficient water for the two Gila Valleys and reaching to the neighborhood of Yuma. It leaves out a large portion of the upper part of both valleys; a portion of the North Gila Valley having also been eliminated by the changes in the Colorado River reduced this acreage to only thirty-five hundred that can be irrigated by gravity. That area can be reached by pumping. That so radically changed the areas, on the basis of our knowledge in 1904, that in my opinion the system is not a feasible system.

Another reason is one developed since that date. We found that the Colorado River passes freely under the levee and at the time of high waters appears on the surface, so that the construction and maintenance of levees does not protect them from overflow. It makes it necessary if they are to be irrigated to provide them with drainage canals of very large capacity, the water from which must be pumped into the river. We have had a very expensive and serious experience on the opposite side of the river, and where the Secretary of the Interior in an effort to do justice has allowed the people to abandon their claims and take up under preference homesteads in the lower Yuma Valley in exchange. And they have suffered serious loss,

for the reason and upon the ground that such testimony is irrelevant and immaterial as the examinations and surveys of the Yuma Project had been duly made under the provisions of the Reclamation Act of June 17, 1902, as conclusively shown by the evidence in this case, in the years 1902, 1903 and 1904, and prior to May 10, 1904, by the Secretary of the Interior for the purpose of locating and constructing said Yuma Project, and that upon such examinations and surveys the Secretary of the Interior had, on May 10, 1904, determined the feasibility and practicability of said Yuma Project, and all thereof, including the North and South Gila Valleys, described in plaintiffs' complaint as Tracts A and B, respectively; and did thereafter duly let contracts for the construction thereof; and any opinion of the witness Davis in 1919 as to whether or not said project was then, or on April 6, 1917, feasible and practicable is irrelevant and immaterial and an attempt to impeach and impair an official and judicial determination of his superior officer, the Secretary of the Interior, made in 1904, when such officer had jurisdiction to so determine and estimate. And upon the further ground that it is irrelevant and immaterial what was the significance of the acquisition (if there was an acquisition) of the Lower Colorado Irrigation District, for the reason that all such questions and negotiations were merged in the written contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7; and said testimony of said witness was an attempt to vary the terms of said written instrument by parole. And for the further reasons that all the surveys and plans referred to in said testimony had been reduced to writing, and the plan and surveys themselves were the best evidence; to which

ruling of the Court in overruling plaintiffs' objections to the introduction of said testimony and in admitting its introduction, the plaintiffs duly excepted at the time.

9.

That said District Court erred in admitting, over plaintiffs' objections, the following testimony of the witness Arthur P. Davis (Trans. Rec. 401-2):

Witness: We began the construction of the drainage canal in the lower valley some time ago. I dont remember how long ago—over two years—and immediately a protest was set up by the people in the valley against it, whose judgment was, it was not needed. Written objections were made to the Secretary of the Interior and referred to me, and written objections were made to me personally and I requested and urged to go to the Yuma Valley and hear representations on that subject, and I was there in Yuma visited by a large representation of the farmers of the Yuma Valley, most if not all of whom were members of the Water Users' Association and some I believe were officers thereof. They presented me with a stack of cards, and a petition in strong terms requesting that the drainage be stopped and abandoned, and very strong representations were made to me at the same time to the same effect, and we at that time had two dredges in the valley, one was at work and the other about to be put to work. I was of the opinion that the time for beginning had arrived; that something had already developed and it might be carried forward slowly and it was my intention to have two dredges there and perhaps order others if needed, but owing to those protests, having already started one dredge, we confined our operations to one dredge, and in this meeting I explained the operation with the idea that when we got to a certain point in the valley we would stop.

for the reason that said testimony is hearsay; to which ruling of the Court in overruling plaintiffs' objections to said testimony, and in admitting the same, the plaintiffs duly excepted.

10.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of Arthur P. Davis (Trans. Rec. 404-7):

Assuming that the public notice of April 6, 1917, had been postponed until the completion of the piece of drain referred to by the witness Bondesson, the drainage system would not even then be completed. I think it will not be in my lifetime that no more drainage will be necessary. The mere building of the main drain is but an important start on that work. The construction of the main drain will by no means involve the drainage problem in Lower Colorado Valley. If the extra piece of drain referred to by Bondesson

were completed, something else would arise—speculative, it is true. As a whole the project is in a completed condition in the Lower Colorado Valley, as a practical matter, in the only sense in which it is completed, or ever will be completed, and that state was arrived at a considerable time before the issuance of the public notice of April 17, 1917. By a practical matter I mean that the delivery of water, and the facilities for the delivery of water and irrigating and cultivating land are excellent and hard to beat; that the drainage has been kept close up to the limit of practical economical construction, and that no considerable portion of the land in the lower valley, as irrigation projects go, has ever been impractical of cultivation or irrigation by reason of delay of drainage. There probably — not be any additional drainage necessary:

for the reason and upon the grounds that said testimony was irrelevant and immaterial and too speculative, it not tending to prove or disprove whether or not the proposed works of the Yuma Project as set forth and described in the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed or uncompleted at the time of the institution of this suit, or at the time of the trial; what will happen in the future or subsequent to the trial herein could not tend to throw any light upon what had happened on April 6, 1917, the date of the so-called public notice involved in this suit; to which ruling of the Court in overruling plaintiffs' objection to the admission of said testimony, and in admitting it, the plaintiffs duly excepted at the time.

11.

That said District Court erred in admitting over the objections of the plaintiffs the following testimony of the witness Joseph B. Lippincott (Rec. 606):

Q. Now what you have stated is all you have to base your opinion upon that the Yuma Project is finished?

A. No, sir; no, sir.

By the Yuma Project I mean the Yuma Project as finally adopted by the Secretary of the Interior. The fact that the Yuma Valley is a going business, going farming community, the fact that the lands are highly improved, the fact that the whole unit shows the successful operations of farming in that valley, paved roads and good houses, and fields under intensive cultivation, the fact that the farmers of this region are apparently able to successfully carry on farming operations under irrigation. In fact, the Yuma Valley presents to me one of the most prosperous and successful farming demonstrations that I have seen in this country. I would say as far as the cultivation of lands by irrigation in this Yuma Valley is concerned that the project was finished. There doubtless will be many things to do in the future. I doubt if the time will ever arrive—not arrive in my lifetime, when construction work is no longer necessary in the Yuma Valley, just as the time never seems to arrive when the con-

struction work on these big transcontinental railroads has reached their final completion, and the project is a finished project in my judgment in that the landowners of that community are able very successfully to carry on the business for which that project was designed.

for the reason and upon the grounds that said testimony was not responsive to the questions asked and was not within the scope of the cross-examination of the witness, and such testimony did not tend to prove or disprove whether or not the proposed works of the Yuma project mentioned in the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed, and the evidences of prosperity testified to by said witness is no evidence whatsoever that the Yuma Project was completed as a physical fact; to which ruling of the Court in overruling plaintiffs' objection to said testimony, and in admitting it, the plaintiffs then and there duly excepted.

12.

That said District Court erred in denying plaintiffs' motion to strike from the record the testimony of the witness Joseph B. Lippincott, set forth in the preceding Division No. 11, to which reference is hereby made for the sake of brevity, for the reasons and upon the grounds set forth in said preceding Division, which reasons and grounds are not herein set forth for the sake of brevity, but it is prayed that reference may be made to said Division; to which ruling of the Court in denying said motion the plaintiffs then and there duly excepted. (Rec. p. 490.)

13.

That said District Court erred in refusing at the close of the evidence in the trial of this case, to grant leave to the plaintiffs to file a supplementary pleading herein in words and figures, as follows, to wit: (Trans. Rec. 542-3).

(Title of Court and Cause.)

(Trans. Rec., p. 138.)

Plaintiffs complain, and allege, and respectfully show, the Court, that, as plaintiffs are informed and believes, since the commencement of this suit and in the summer of 1917, the Secretary of the Interior did make certain orders whereby he purported to declare and determine that the Yuma project or Reclamation Service as embraced within the lower Colorado Irrigation District, as described in the complaint, was then and there completed and finished, notwithstanding that certain portions thereof, to wit, tracts A and B, as set forth, described and delineated in the complaint, had not been

in any manner physically reclaimed, as more particularly set forth in said complaint, and notwithstanding that the drainage system of Tract C, as described in the complaint, had not been completed; that as plaintiffs are informed and believe, the said orders so made by the Secretary of Interior, were made for the purpose of affecting the ultimate adjudication of this suit, and were made by the Secretary of the Interior without due and proper investigation, and without jurisdiction, for the reason that the Secretary of the Interior had, many times from the year 1904 until the end of the year 1916, declared and determined that said portions of the Yuma Project were feasible, practical and advisable, and in fact said portions were, at the time of making said orders and each of them, feasible practicable and advisable of construction as originally planned and determined by the Secretary of the Interior in the year 1904; and the Secretary of the Interior was not, in the Summer of the year, 1917, in possession of any facts or information that would justify the making of said orders, or either of them; and that the making of said orders was without the jurisdiction of the Secretary of the Interior, and in violation of the letter and spirit of the contract entered into between plaintiff corporation and the United States of America, on May 31, 1906, a copy of which is annexed to the complaint herein as an exhibit, and the said orders, and the making thereof, was and is an abuse of any and all discretion vested in the Secretary of the Interior by law, or at all; and it would be inequitable and unjust to permit the defendants in this case to deprive the plaintiffs herein of the use of irrigating water in the manner described in the complaint, or at all, because of the making of said orders.

2. That, as plaintiffs are informed and believe, in the year 1918, and subsequent to the commencement of this suit, the Secretary of the Interior, acting for and in behalf of the United States of America, entered into a certain written agreement with Imperial Irrigation District, a municipal corporation of the State of California, whereby the said municipal corporation promised and agreed to pay to the United States of America, the sum of One Million Six Hundred Thousand Dollars, for certain rights and privileges in the use of and taking of water from the Laguna Dam of the Yuma project of the United States Reclamation Service, whereupon, the Secretary of the Interior, acting for and on behalf of the United States of America, promised and agreed to and with the plaintiff corporation, acting through and by its duly authorized representative, one Mulford Winsor, that said sum of One Million Six Hundred Thousand Dollars, so agreed to be paid by said Imperial Irrigation District to the United States of America, should be and would be credited to the land owners within Tract C of the Yuma project, otherwise the Lower Yuma Valley, as described in the complaint, upon the amounts declared to be due upon their lands for the cost and expense of said Yuma Project, in the same proportion as the cost of the Laguna Dam of said project had been pro rated upon the lands of the said land owners; for which reason it would be unjust

and inequitable to permit the defendants in this suit to deprive the plaintiffs of the use of irrigating water in the manner described in the complaint, or at all.

Wherefore, plaintiffs pray that they have the relief prayed for in the complaint filed herein.

THOS. D. MOLLOY,
*Solicitor for Plaintiffs.*

(Duly verified.)

for the reason and upon the ground that such refusal was in abuse of the discretion of said Court, said pleading being necessary and proper, as it set up matters and things that had occurred since the filing of the original complaint herein, and prepared to meet and set forth a defense created by the defendants and their superior officers subsequent to the filing of the complaint herein, and that the second paragraph thereof set forth an equitable defense against the charge of seventy-five dollars per acre, even if such an amount had been the estimated cost as originally determined by the Secretary of the Interior; to which ruling of the Court in refusing permission to file said pleading plaintiffs thereupon duly excepted. (Trans. Rec. p. 543.)

14.

That said District Court erred in finding and deciding (Trans. Rec. p. 555) that the Yuma Project has cost greatly in excess of the estimate by the engineers, it being irrelevant and immaterial whether or not the actual cost is greatly, or at all, in excess of the estimates made by the engineers, for the reason that Section 4 of the said Reclamation Act requires and determines the amount to be repaid into the Reclamation Fund as the estimated cost originally made by the Secretary of the Interior; in any event, there was not sufficient, or any, evidence before the court establishing the fact that the actual cost greatly or at all, exceeded the estimated cost, said District Court having ruled and decided during the progress of the trial that it did not care to hear any evidence as to the actual cost of the project, and Section 4 of said Reclamation Act of June 17, 1902, requiring that the estimated cost and not the actual cost be repaid.

15.

That said District Court erred in finding and deciding (Trans. Rec. p. 561) that the testimony in this case shows that the annual net revenue per acre of the lands within the Yuma Project is almost equal to the cost per acre of the project; there being no evidence whatsoever in this case as to the rental value of any lands whatsoever within the Yuma Project, except as to one tract of land belonging to the witness Oscar P. Bondesson; such finding being against the evidence and unsupported by the evidence.

16.

That said District Court erred in not passing and deciding upon plaintiffs' contention set forth in their amended pleading filed at the commencement of the trial in this case on April 28, 1919, wherein the plaintiff association sued and contended for and on behalf of certain of its constituent members who made homestead entries subsequent to the commencement of the Yuma Project and after the lands therein had been withdrawn from all form of entry, except homestead entries, under the provisions of said Reclamation Act, and who are the owners and holders of larger areas of land embraced in said entries than would be permitted to be held by them according to the terms of the so-called public notice of April 6, 1907, defendants' Exhibit 8, which attempts to reduce the holdings of said entrymen to a farm unit of the area of forty acres, or less, notwithstanding that by operation of law and the acceptance of the filing fees and commission for larger areas than forty acres, and the Secretary of the Interior permitting said entrymen to hold their said lands for long periods of years, the area per entry of each and all of said entries had been fixed and determined at a greater area than forty acres; and the evidence in this case in any event shows that the Secretary of the Interior had, in the year 1910, fixed the area of farm units in said Yuma Project at eighty acres per entry; and erred in finding and deciding, in effect, against said contentions by entering its decree dismissing plaintiffs' bill.

17.

That said District Court erred in finding and deciding (Trans. Rec. 556) that this case is governed by the decision in the case in the U. S. District Court in and for the District of Idaho, namely, Payette-Boise Water Users' Association vs. D. W. Cole, et al., for the reason that the evidence in the stated case shows conclusively that the settlers and land owners within the Payette-Boise Project waived their rights under Section 4 of said Reclamation Act of June 17, 1902, while in this case it has not been proved, nor attempted to be proved, that the plaintiffs in this case, or any of them, waived their rights under Section 4 of said reclamation Act to have granted to them a water right at the estimated cost of less than forty dollars per acre.

18.

That the said District Court erred in finding and deciding (Trans. Rec. 559) that the case of Swigart vs. Baker, 229 U. S. 187, is controlling in this case, for the reason that the questions here involved were not before the Supreme Court of the United States for decision or adjudication in that case, and anything therein decided was dictum as far as this case is concerned; and that the U. S. Supreme Court, in the Swigart-Baker case, did not pass upon or construe Sections, 2, 3 and 4 of the Reclamation Act of June 17, 1902, which are involved in this case.

19.

That said District Court erred in finding and deciding (Trans. Rec. p. 553), that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands benefited, and that such cost, when collected, should be paid into the Reclamation Fund to replenish its fund, and thereby make irrigation at least a self-sustaining enterprise; such finding and decision being contrary to the provisions of Sections 2, 3 and 4 of said Reclamation Act of June 17, 1902. (32 Stat. 388.)

20.

That said District Court erred in finding and deciding (Trans. Rec. p. 553) that it cannot be supposed that the estimated cost based "on opinion and roughly made from imperfect data," such only as was available in laying out work on a large scale is all that the land owners can be required to pay regardless of the actual cost of the project; that to place such a construction on the Reclamation Act would in effect nullify it and defeat its every purpose; that it was the purpose of Congress to require the charges to be equitably apportioned with a view of returning to the Reclamation Fund the entire cost of construction thereof, and that the term "estimated cost" must be interpreted and construed in the light of the objects and purposes sought to be accomplished, and of the situation surrounding the proposed project during and at the time the preliminary examinations and surveys were being made; said finding, decision and construction of law being contrary to the letter and spirit of the Reclamation Act of June 17, 1902, and particularly Sections 2, 3 and 4 thereof.

21.

That the said District Court erred in finding and deciding (Trans. Rec. p. 554) that the estimated cost of the Yuma Project is the cost as finally announced by the Secretary of the Interior on April 6, 1917, for the reason that the evidence conclusively shows that the Secretary of the Interior did, on or about May 10, 1904, and some thirteen years prior to April 6, 1917, fix and determine the estimated cost of the Yuma Project at less than forty dollars per acre; such finding being unsupported by the evidence and against the evidence, and contrary to the letter and spirit of the Reclamation Act of June 17, 1902.

22.

That said District Court erred in finding and deciding (Trans. Rec. p. 560) that the Secretary of the Interior did not make an estimate of the cost of the Yuma Project on May 10, 1904, and in finding and deciding that the circulation among the landowners and settlers within the Yuma Project in May, 1904, of a certain

pamphlet containing letters, reports and estimates, did not constitute a public notice within the meaning of the Reclamation Act; and in finding and deciding that the public notice was the one given April 6, 1917; the evidence in this case conclusively showing that the Secretary of the Interior did estimate and determine the cost of the Yuma Project on May 10, 1904, and did thereafter, on May 28, 1904, and continuously until May 31, 1906, in compliance with Section 4 of the Reclamation Act of June 17, 1902, give public notice of the lands irrigable under said project, and of the charges which should be made per acre upon the entries and private lands therein, together with the number of annual installments in which said charges should be paid, and the time when such payments should commence.

23.

That said District Court erred in finding and deciding (Trans. Rec. p. 560) that the contract of May 31, 1906, Exhibit "C" annexed to plaintiffs' complaint, and defendants' Exhibit 7, means, or should be construed as meaning and expressing, that the plaintiffs are bound thereby to pay that part of the cost of the Yuma Project attempted to be apportioned thereto by the Secretary of the Interior by the so-called public notice of April 6, 1917; for the reason that said contract should be construed to have written into it the express terms of Section 4 of the Reclamation Act of June 17, 1906, whereby it is prescribed that the estimated cost of the project shall be returned to the Reclamation Fund; and the evidence in this case conclusively shows that the cost of the Yuma Project was estimated and determined on May 10, 1904, by the Secretary of the Interior; and erred in finding and deciding that said contract provides by its terms that the payments to be return to the Reclamation Fund for the construction of the Yuma Project are now due and payable; said contract providing by its express terms that the payments shall not begin until the Yuma Project is completed; and the evidence in this case conclusively showing that said Yuma Project is not yet completed.

24.

That said District Court erred in finding and deciding (Trans. Rec. p. 564) that the Yuma Project from a practical standpoint, or at all, was completed on April 6, 1917; the evidence in this case conclusively showing that said project was not completed on April 6, 1917, and that it is not now completed, and there being no evidence whatsoever proving or tending to prove that said project is completed or that it was completed April 6, 1917.

25.

That the United States District Court for the District of Arizona erred in adjudging and decreeing (Trans. Rec. p. 565) that plaintiffs' bill of complaint herein be dismissed, thereby denying the plaintiffs the equitable relief prayed for in their complaint herein,

such decree and judgment not being supported by the evidence, and being against the weight of the evidence, and being contrary to law and equity, in the following particulars, to-wit:

(*a*) That said judgment and decree is unsupported by the evidence, and is contrary to the weight of the evidence in this, that the contract which is annexed to plaintiffs' complaint as Exhibit "C" thereto, and in evidence herein as defendants' Exhibit 7, provides, according to its express terms, that the payments for the water rights to be issued to the shareholders of the plaintiff association, under the provisions of the Reclamation Act of Congress, June 17, 1902 (32 Stat. 388), should not be begun to be made until the completion of the proposed reclamation works of the Yuma Project of the United States Reclamation Service, the subject of said contract; and the evidence in this case conclusively proves and shows that said proposed works were not completed at the time of the institution of this suit, and are not now completed; and the defendants were attempting to, at the time of the institution of this suit, and will, unless enjoined by this court, unlawfully and wrongfully compel the plaintiffs to commence making such payments prior to the completion of said proposed works, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(*b*) That said Reclamation Act of June 17, 1902, provides, among other things, that the charges which shall be made per acre upon lands within the United States Reclamation Projects, including the Yuma Project, which is the subject of this suit, shall be determined with the view of returning to the Reclamation Fund the estimated cost of the construction of the project; and the evidence in this case conclusively shows that the estimated cost of said Yuma Project, as fixed and determined by Secretary of the Interior in accordance with said act, is less than the sum of forty dollars per acre, and the defendants in this case were, at the time of the institution of this suit, unlawfully attempting to, and will, unless enjoined by this court, wrongfully compel the plaintiffs to pay the sum of seventy-five dollars per acre as the cost of said project, by unlawful and inequitable means, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(*c*) That the evidence in this case shows and proves that it was at the time of the institution of this suit, and now is, the duty of the defendants continue to supply irrigating water to the lands of the plaintiff Archie J. Griffin, and those for whom he sued herein, situated in Tract A as described in the complaint herein; and that the defendants have unlawfully and wrongfully shut off, and refused to deliver, irrigating water onto the said lands, and will continue to shut off and refuse to deliver such water to said lands to the great and irreparable injury and damage of the plaintiff Griffin and those for whom he sues herein, and the plaintiff Yuma County Water Users' Association.

(*d*) That the evidence in this case shows and proves that the entrymen who are constituent members of the plaintiff Yuma County

Water Users' Association, and for whom said plaintiff association is suing herein, as particularly described and set forth in plaintiffs' amended pleading filed with leave of court on April 28, 1919, at the commencement of the trial herein, are lawfully entitled to hold the full areas of their, and each of their, respective entries, and the defendants were at the time of the institution of this suit unlawfully and wrongfully attempting to compel said entrymen*t* to reduce each of their respective entries to forty acres in area, and the defendants will, unless enjoined by this court, continue to wrongfully and unlawfully attempt to compel said entrymen*t* to so reduce their said entries, by wrongfully and unlawfully shutting off and refusing to supply to said entrymen irrigating water for the lands embraced in their respective entries, to the great and irreparable injury of the said entrymen.

(*e*) That the evidence shows that the defendants were proceeding, and will proceed, unless restrained by this court, to unlawfully and wrongfully shut off irrigating water from the lands of all the plaintiffs and those for whom they sue herein to their great and irreparable injury and damage, and that in law, justice and equity the plaintiffs are entitled to the relief prayed for in their complaint; and said court erred in not granting the relief prayed for, and in not perpetually restraining and enjoining the defendants from shutting off and refusing to supply irrigating water to said lands, and in not otherwise doing equity as prayed for.

(*f*) That the evidence and pleadings herein conclusively show that the defendants were, at the time of the institution of this suit, unlawfully attempting, and will, unless restrained and enjoined by this court, continue to unlawfully attempt to compel the plaintiffs, and those for whom they sue herein, to execute and deliver to them an unlawful, unconscionable and inequitable contract, which would have the effect, among other bad effects, of depriving them, and each of them, of their, and each of their, property for a public purpose without compensation and due process of law, in violation of the Constitution and laws of the United States and the State of Arizona, a copy of which contract is annexed to plaintiffs' complaint as Exhibit "D" thereto, and in evidence as defendants' Exhibit 16, by threatening to shut off the supply of irrigating water from their lands, to their great and irreparable injury and damage.

26.

That said District Court erred in not granting the relief prayed for in plaintiffs' complaint, for all the reasons and upon all the grounds set forth in the preceding Paragraph on Division No. 25, which, for the sake of brevity, are not set forth here, but to which reference is hereby prayed.

Second.

That the United States Circuit Court of Appeals for the Ninth Circuit in its said Decision and Judgment erred in finding and deciding as follows:

1.

In finding and deciding that the Public Notice of April 6, 1917, for the Yuma Project of U. S. Reclamation Service was given by the Secretary of the Interior in clear accord with the Statute: for the reason that the evidence conclusively shows that the cost of the said Yuma Project was estimated and determined by the Secretary of the Interior on May 10, 1904, at less than $40.00 per acre, and, under the law it thereupon became the duty of said Secretary to give public notice for said Project, which was actually given on or about May 28, 1904, and the Reclamation Act provides that only the estimated cost shall be returned to the Reclamation Fund; said notice of April 6, 1917, containing a charge of $75.00 per acre, and being improvidently given after the Secretary had lost jurisdiction to give such notice and to fix such charges.

2.

In finding and deciding there is no real importance to the point raised by the Appellants that the system was not completed when this suit was commenced; for the reason that such point was, and is, of vital importance in the adjudicating of this case; the contract between the Secretary of the Interior and the principal appellant, Yuma County Water Users' Association, providing that the first payment for said Yuma Project, or system, should not be made until the completion of the proposed works—the system—and the evidence showing that the same was not completed, by a substantial and material fraction, when this suit was commenced.

3.

In finding and deciding that the appellants are not entitled to any relief, and in failing to reverse the Decree of the U. S. District Court for the District of Arizona, and in not granting the relief prayed for the appellants:—because of each and all of the grounds and reasons set forth in Divisions 1 to 25, inclusive, of the First Assignment of Error herein; which said grounds are not, for the sake of brevity, set forth herein; but are hereby referred to and made part of this Assignment of Error.

Wherefore, because of the Errors aforesaid appellants pray that the Judgment and Decrees of said United States Circuit Court of Appeals, for the Ninth Circuit, and said United States District Court for the District of Arizona, entered in this suit, and each of them, be voided, annulled and reversed; and that said Lower Courts be di-

rected to enter judgments and decrees awarding to the appellants the relief prayed for in their Bill of Complaint; or that the Supreme Court of the United States enter such judgment as it shall deem just and lawful and equitable.

(Sgd.) THOS. D. MOLLOY,
*Solicitor for Appellants.*

[Endorsed:] Notice of and petition for, order allowing appeal to Supreme Court U. S. and fixing amount of supersedeas bond, and assignment of errors. Filed November 21, 1921, F. D. Monckton, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION et al., Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Supersedeas Order.*

Whereas, the above-named appellants have given notice of appeal to the Supreme Court of the United States from the judgment and decree entered herein on the 7th day of November, 1921, and desire that during said appeal the aforesaid Judgment and Decree shall be superseded in part so as to preserve as near as may be the status heretofore existing during the pendency of the appeal from the U. S. District Court for the District of Arizona.

It is hereby ordered, as a condition to the superseding as aforesaid of said final decree, and the preservation as near as may be of the aforesaid status:

(*a*) That the appellants proceed with diligence to perfect their said appeal to said Supreme Court.

(*b*) That the constituent members of said Yuma County Water Users' Association and land owners within the second Unit of the Yuma Project of the U. S. Reclamation Service who have not heretofore executed and filed water right application under the terms and conditions of the public notice issued for the aforesaid until of the Yuma Project under date of April 6th, 1917, shall prior to being furnished irrigation water (unless the same shall be otherwise furnished under some proper order of the Secretary of the Interior) properly execute and deliver to the appellees, or their successors in office, a water right application as required by the said public notice of April 6th, 1917, and on the forms provided for such purpose by the Secretary of the Interior of the United States, said applications to be modified, however, (1) by striking therefrom all of Article 8 thereof, being that certain article granting unto the United States of

America rights-of-way, and (2) by the addition thereto of a new article or clause providing in substance that the execution and delivery of such application shall be without prejudice to the rights of the applicant to have the amount of the construction charge as in said applications stated redetermined and reassessed in such other and different amount as may be determined upon as just, proper and equitable by the Judgment and Decree of the Supreme Court of the United States upon the hearing of and decision on the appeal of the appellants; and that all of said constituent members and landowners who have heretofore executed and filed such water right applications shall continue to pay their construction charges computed at $40.00 per acre until the final decree of said Supreme Court, or until otherwise ordered by said Supreme Court, and shall likewise be subject to the terms and conditions of the succeeding paragraphs hereof.

(c) That at the time of the execution and delivery of the aforesaid water right applications, each and every applicant shall pay into the Reclamation Fund, in addition to the customary charge covering the preparation and cost of recordation of the applications in the public records of Yuma County, Arizona, (1) the amount then due under such applications, computed on a construction charge of $40.00 per acre, commencing with the installment of the construction charge due December first, 1917, where the provisions of Section 2 of the Reclamation Extension Act of August 13, 1914 (32 Stat., 686), may be applicable, or commencing at the date of temporary application for a supply of irrigation water under the terms and conditions of the stipulation of the parties herein, instances where Section 1 of the aforesaid Reclamation Extension Act is applicable, plus the penalties prescribed by said act; (2) the difference between the amount or amounts heretofore paid under the terms and conditions of the formal stipulation aforesaid of the parties herein on account of operation and maintenance, and the amounts payable under the public notice of April 6th, 1917, as amended by public notice of March 24th, 1919; (3) thereafter and during the pendency of and until the decision of the said Supreme Court, each said applicant shall continue to *apy* on December first of each year the annual installments of the construction charge, if any, computed on a charge of $40.00 per acre and in the event said appellants shall fail to make good their plea on appeal to the said Supreme Court then and in that event such applicants shall within a period of ninety days (90) from and after the filing of the decision of the said Supreme Court, pay into the Reclamation Fund the difference between the installments on the basis of a construction charge of $40.00 per acre, and the installments of the construction charge stated in the aforesaid water right application, or as the same may be modified or redetermined by the decree of the said Supreme Court, plus the penalties provided by the Reclamation Extension Act, said penalties to run from December 1, 1917, or the date of the application for temporary irrigation water pursuant to the terms and conditions of the stipulation of the parties herein, according as said section 1 or section 2 of the Reclamation Extension Act may be applicable, and

until paid, and (4) each applicant shall also pay or cause to be paid into the Reclamation Fund an annual operation and maintenance charge in the amounts and at the times announced in public notice issued February 6th, 1920, or such amendments thereof as may be or have been properly and lawfully promulgated, and all sums either on account of operation and maintenance or construction not paid when due shall be subject to the penalties prescribed by the Reclamation Extension Act; provided, however, that all Orders of the Secretary of Interior as to the furnishing of Water to excess landowners and excess lands shall continue in force during the periods for which they were promulgated and all extensions thereof.

It is further ordered, that the said appellants shall execute a good and sufficient bond to the appellees, to be approved by a Judge of said Court, in the penal sum of Ten Thousand Dollars ($10,000) conditioned nevertheless that if the said appellants shall prosecute their appeal to effect and, in the event they fail to make good their plea, shall pay or cause to be paid into the Reclamation Fund all costs of this suit and the penalties prescribed by the aforesaid Reclamation Extension Act and as provided in subdivision 3 of paragraph (c) hereof, then the said obligation to be void, otherwise to remain in full force and effect.

And it is further ordered, that upon full compliance by the appellants and the constituent members of the Yuma County Water Users' Association with all the foregoing terms and conditions of this order the appellees, and their, and each of their successors in office, be and they are hereby enjoined and restrained until ninety (90) days from and after the filing of the decision of said Supreme Court in said appeal, from shutting off irrigation water from the lands of the appellants and the constituent members and stockholders of the Yuma County Water Users' Association situate within the Second Unit (Yuma Valley Unit) of the Yuma Project of the United States Reclamation Service.

Done at the City of San Francisco, California, this 21st day of November, 1921.

(Sgd.)

WM. H. HUNT,
*Circuit Judge of said Court.*

[Endorsed:] Supersedeas order. Filed November 21, 1921, F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, RALPH THURMAN, and ARCHIE J. GRIFFIN, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Supersedeas Bond on Appeal.*

Know all men by these presents:

That we, Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin, as principals, and Oscar P. Bondesson, as sureties, are held and firmly bound unto W. W. Schlecht and David C. Caylor, in the sum of $10,000, lawful money of the United States, to be paid to them, and their respective executors, administrator sand heirs, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of November, 1921.

The condition of the above obligation is such that whereas the above named Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin, have appealed to the Supreme Court of the United States, from the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit, filed and entered on the 7th day of November, 1921, affirming the judgment and decree of the U. S. District Court for the District of Arizona in said cause, and from all thereof, and to reverse said judgments and decrees, and all thereof.

Now, therefore, if the above-named principal obligors shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, and shall pay, or cause to be paid, into the Reclamation Fund all costs of this suit and the penalties prescribed by the Reclamation Extension Act, approved August 3, 1914 (38 Stat. 686), then this obligation shall be void, otherwise remain in full force and effect.

[SEAL.] YUMA COUNTY WATER USERS' ASSOCIATION,
By WM. WISENER,
*President.*

Attest:

H. L. BELTZHOOVER,
*Secretary.*

OSCAR P. BONDESSON.
FRED L. INGRAHAM.
W. E. MORRELL.
C. E. YARWOOD.

J. A. DONOVAN,
ROBERT H. THEILMANN,
RALPH THURMAN,
By THOS. D. MOLLOY.
ARCHIE J. GRIFFIN.

STATE OF ARIZONA,
*County of Yuma, ss:*

Oscar P. Bondesson, Fred L. Ingraham, W. E. Morrell and C. E. Yarwood, being first duly sworn, each for himself and not for the other, deposes and says: That he is worth the amount for which he has become surety on the above bond, over and above all his just debts and liabilities, in property situate in the State of Arizona, and not exempt from execution.

OSCAR P. BONDESSON.
FRED L. INGRAHAM.
W. E. MORRELL.
C. E. YARWOOD.

Subscribed and sworn to before me this 18th day of November, 1921.

[SEAL.]

THOS. D. MOLLOY,
*Notary Public.*

The within and foregoing bond is hereby approved, both as to sufficiency and form, this 21 day of November, 1921.

WM. H. HUNT,
*Circuit Judge of said Court.*

Office of the Treasurer of Yuma County, State of Arizona.

I, W. D. Riley, Treasurer and Ex-Officio Tax Collector of Yuma County, State of Arizona, and Custodian of the Duplicate Assessment Roll of said County, do hereby certify that it appears from said Duplicate Assessment Roll of the year 1921, the Oscar P. Bondesson, W. E. Morrell, Fred L. Ingraham and C. E. Yarwood, whose names appear as sureties on a certain Supersedeas Bond on Appeal in the Circuit Court of Appeal of United States, for the Ninth Circuit, on appeal from the said Court of the Supreme Court of the United States, that said sureties are respectively, assessed with

real and personal property in said County in the amounts set after their respective names, to wit:

| | |
|---|---|
| Oscar P. Bondesson in the sum of | $49,020.00 |
| W. E. Morrell in the sum of | $16,060.00 |
| Fred L. Ingraham in the sum of | $42,370.00 |
| C. E. Yarwood in the sum of | $19,390.00 |
| Inez I. Ingraham, the wife of Fred L. Ingraham in the sum of | $31,750.00 |

Witness my hand — official seal this 18th day of Nov., 1921.
[Seal W. D. R.] W. D. RILEY,
*Treasurer & ex-Officio Tax Collector as Aforesaid.*

Office of the County Recorder of Yuma County, State of Arizona, ss.

I, A. K. Ketcherside, County Recorder of Yuma County, State of Arizona, do hereby certify that the records of my office disclose that the above-named sureties, respectively have unsatisfied Mortgages of record in my office against their respective names and property, as set after their respective names, and no more, to wit:

| | |
|---|---|
| Oscar P. Bondesson in the sum of | Nothing. |
| W. E. Morrell in the sum of | $30,000.00 |
| Fred L. Ingraham in the sum of | 12,102.10 |

$5,000.00 of above on Inez T. Ingraham's Property.
A. K. K.

C. E. Yarwood in the sum of ..... Nothing.

Witness my hand and official — November 18th, 1921.
[SEAL.] A. K. KETCHERSIDE,
*County Recorder as Aforesaid.*

[Endorsed:] Supersedeas Bond on Appeal to Supreme Court U. S. Filed F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, and Ralph Thurman and Archie J. Griffin, Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

six-hundred and ninety (690) pages, number from and including 1 to and including 690 and comprising two volumes marked, respectively, Volume I and Volume II, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together with the following marked original exhibits, viz: Plaintiffs' Exhibits 5-13, 26 and 33, and Defendants' Exhibits Nos. 5, 7, 17 and 18, constitute the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and seal of the said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 16th day of January, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk.*

By PAUL P. O'BRIEN,
*Deputy Clerk.*

In the U. S. Circuit Court of Appeals, 9th Circuit.

No. 3593.

YUMA COUNTY WATER USERS' ASSOCIATION et al., Appellants,

vs.

W. W. SCHLECHT and DAVID C. CAYLOR, Appellees.

*Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. W. Schlecht and David C. Caylor, appellees, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at the City of Washington, D. C., within sixty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals, for the Ninth Circuit, wherein Yuma County Water Users' Association et al. are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Office Supreme Court, U. S.
FILED
OCT 6 1922
WM. R. STANSBURY
CLERK

# APPELLANTS' BRIEF

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

## No. 7[redacted]268

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, ET AL., APPELLANTS

vs.

W. W. SCHLECHT AND DAVID C. CAYLOR

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED_____, 1922

(28,695)

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IN THE

# Supreme Court of the United States

October Term, 1921

Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin,
Appellants.

vs.

W. W. Schlecht and David C. Caylor, Appellees.

No. 740

## APPELLANTS' BRIEF

### STATEMENT OF THE CASE

1. This case is here on appeal from the Decision and Judgment of the U. S. Circuit Court of Appeals, Ninth Circuit, (Trans. Rec. p. 632-635) which affirmed a Decree in Equity of the U. S. District Court for the District of Arizona (Trans. Rec. p. 547-564) denying the plaintiffs there, appellants here, the relief prayed for in their complaint: mandatory injunctive relief as to the furnishing of irrigation water to the lands of appellants.

2. It arises under the Act of Congress of June 17, 1902 (36 Stat. 388), commonly called the Reclamation Act, and involves the interpretation and construction of that Act, particularly Sections

4, 3 and 2 thereof, as well as a certain contract made thereunder in May, 1906 (Trans. Rec. p. 41).

3. The principal Appellant, Yuma County Water Users' Association, being a private Arizona Corporation, but organized at the request, under the directions of, and according to rules laid down by, the Secretary of the Interior of the United States, in accordance with Sections 5, 6 and 10 of the Reclamation Act, it being one of more than a score of similar corporations organized throughout the West for the better and more convenient working of that Act; the other appellants being constituent members of the Association, and land owners within the district over which the Association exercises control.

4. The defendants are the local officers of the Yuma Project of the U. S. Reclamation Service, Project Manager and Irrigation Manager, respectively, in charge of the distribution of irrigation water to the lands of the appellants.

5. The controversy arose from the following

STATE OF FACTS:—

a. The lands involved are located on the Arizona side of the Colorado River, above and below the confluence of the Gila at the town of Yuma, Arizona (see Plat p. 40, Trans. Rec., also p. 9 hereof). At the time of the passage of the Reclamation Act practically all of the lands affected, except a score, or so, of quarter sections adjacent to the Gila River, were in what is known as "private ownership," as distinguished from the public domain, i. e., the Yuma Project lands had practically all passed away from the U. S. government by either

patent, or entry under the homestead or desert land laws. Nevertheless, immediately on the approval of the Reclamation Act on June 17, 1902, all lands in the vicinity of Yuma, Arizona, and within six miles of the Colorado River, were withdrawn under the Second Form, according to the provisions of that act, which withdrawal embraced all the land here involved, but practically affected very little of it, for the reason that it was in private ownership. In the Fall of 1902 survey of the Yuma Project were commenced by the U. S. Geological Survey, the predecessor of the U. S. Reclamation Service, in accordance with the provisions Section 2 of the Reclamation Act, which were prosecuted with diligence for about 18 months at a cost of $174,735.85 (9th Annual Report U. S. Reclamation Service, p. 82), which resulted in the completion and presentation to the Secretary of the Interior of elaborate maps, plans and estimate of cost, in accordance with the provisions of Sec. 3 of the Reclamation Act (see Pltffs'. Ex. pp. 164 to 198, Trans. Rec.), and finally, under date of April 8, 1904, a board of consulting engineers, including the present director of the U. S. Reclamation Service, determined the Yuma Project to be feasible, and recommended the setting aside of $3,000,000.00 in the Reclamation Fund for the construction thereof (Trans. Rec. p. 235); which recommendations met the approval of the Director of the U. S. Geological Survey (Trans. Rec. p. 199), who in turn on May 9, 1904, made the same recommendations to the Secretary of the Interior, who immediately, May 10, 1904, adopted the recommendations, declared 85,000 acres of said lands reclaim-

able at a cost of less than $40.00 per acre, and set aside $3,000,000.00 from the Reclamation Fund for the construction of the Yuma Project (Trans. Rec. p. 201), thereby, as appellants here contend, determining the feasibility of the project, the ESTIMATED COST thereof, within the meaning of Sec. 4 of the Reclamation Act, and IRREVOCABLY fixing the charges per acre at less than $40.00, the MAXIMUM which can be collected from the lands, and returned to the Reclamation Fund; the appellees contending that all the surveys, determinations, recommendations, and the actions of the secretary were merely "TENTATIVE," and that the estimated cost was not determined until some 13 years later by another Secretary of the Interior, and at the figure of $75 per acre, which must be paid.

b. In the meantime, the lands in the proposed Yuma Project being practically all in private ownership, as before stated, and there being no feasible or practical method of the U. S. government dealing with the individual landowners and entrymen, and following the plan already adopted and followed by the Secretary of the Intreior for dealing with a like class of landowners and entrymen in the Salt River Valley in Arizona, the Yuma County Water Users' Association was organized on Nov. 3, 1903, as an Arizona corporation, on a plan whereby the shareholder by signing a short agreement (Trans. Rec. 209), and subscribing for the capital stock of the Association, ipso facto mortgaged his land to secure the payment of the cost of the construction of the project. The Association had but little more than skeleton organization until May 28, 1904, when there was a mass meeting of the landowners called,

at the request of the chief engineer of the U. S. Geological Survey, and held under the joint auspices of the Association and the Reclamation Service, at Yuma, Arizona, which was widely advertised and well attended (such mass meetings being also a part of the plan adopted and prescribed by the Interior Department for the final floating of U. S. Reclamation Projects. See Par's 8, 9 and 10 of the Manual for the organization of Water Users' Associations, page 140 hereof). At that meeting maps and plans were displayed, public speeches made by the Chief Engineer and Supervising Engineer of the U. S. Geological Survey, and others; a prospectus, consisting of a pamphlet, in which was incorporated the secretary's letter of May 14, 1904, fixing the charges at less than $40.00 per acre, and setting aside the $3,000,000, was circulated, read and discussed (Pltffs' Exhibit 15, Trans. Rec. p. 213); strong hopes were held forth by the said engineers that the project could be, and would be, completed for the estimate within two years from the actual commencement of work; considerable enthusiasm aroused; and great numbers of landowners then and there "signing up," as the process of simultaneously subscribing for stock of the Association, and mortgaging their lands to secure the cost of the project, was called; with the later result that in the Fall of that year 98 per cent of the lands were "signed up," and the Yuma Project became an assured success as to its beginning.

c. At the time of the passage of the Reclamation Act, and until the coming into the irrigation field

at Yuma, Arizona, of the United States, acting through its Geological Survey, and its successor, the Reclamation Service, there were in active operation three canal systems below the Town of Yuma serving irrigation water to part of the lands in what is designated as "Tract C" on the plat set forth at page 9 hereof. Those canals were inadequate and somewhat inefficient, owing to their inability to handle the large amount of silt carried by the waters of the Colorado River. They were later taken over and operated by the U. S. Reclamation Service during the long delay in the construction of the Yuma Project from 1905 until 1917. There was also a proposed irrigation plan offered by a private corporation, Colorado Delta Canal Company, on a larger and more elaborate scale, as to area, at least, than the later-adopted Yuma Project (see Plat, p. 243 Trans. Rec.); and at the time that the Secretary of the Interior determined that the Yuma Project was feasible, May 10, 1904, that private corporation was a formidable competitor to the United States as the prospective constructor of an irrigation project for the lands here involved, soliciting the execution of, and was having executed and delivered to it, contracts whereby portions of the said lands were being pledged to it to secure the cost of its proposed project, and whereby it undertook to furnish water to those lands for a construction charge of FIFTEEN DOLLARS per acre (see Pltffs' Ex. 18, p. 245 Trans. Rec.), with interest, however, as against $35 per acre for the proposed Government Project; and just prior to May 28, 1904, it was a seriously debated question as to which project would be adopted by the land-

owners (see testimony of Oscar P. Bondesson, page 239, 240-1 Trans. Rec.).

d. Whatever disagreement there may be as to the legal effect of what had taken place prior to and on May 28, 1904, including the declaration of the Secretary of the Interior under date of May 10, 1904 (Rec. p. 201), it may safely be asserted as a fact that the landowners believed on what seemed good reasons to them, that they were to get a going, substantial, first class irrigation project for the gross sum of $3,000,000, and at a cost of probably less than $35 per acre, and in no event to exceed $40.00 per acre, and that by "signing up" they were entering into a contract to that effect.

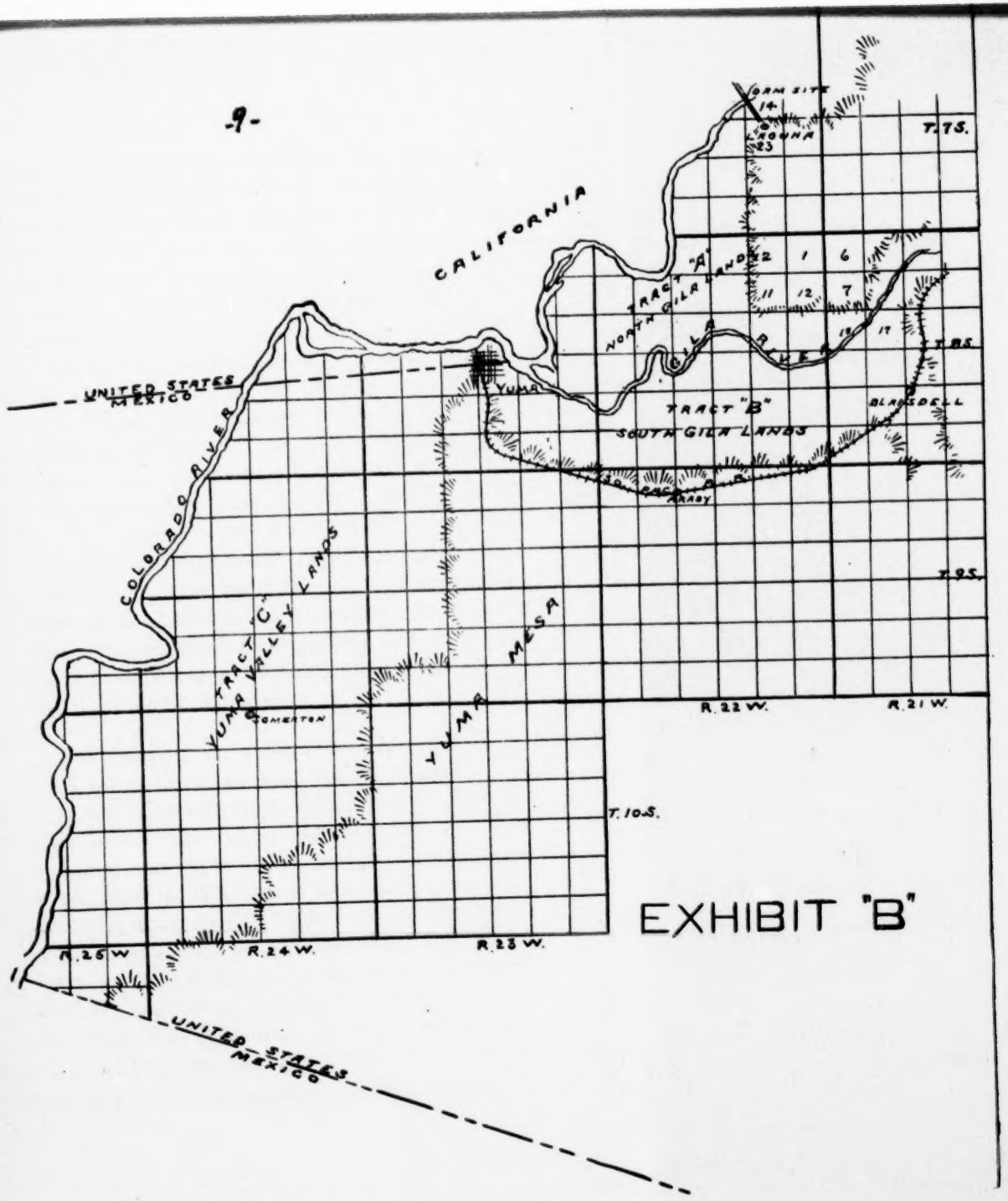
e. The result of "signing up" was that in the Spring of 1905 a contract was let to a New York contractor for the construction of the Laguna Dam, the most important part of the construction, at the contract price of nearly $800,000.00, and later in the same year contracts were let for some 12 miles of levees, another important part of the work. as will be seen from the Plat at page 228 Trans. Rec.; work began on both contracts within a few months after their letting.

f. At this point we reach one of the closely contested points in this case. Nothwithstanding that Sec. 4 of the Reclamation Act required the Secretary of the Interior, upon his determination that the Yuma Project was feasible, etc., to THEREUPON give public notice of the charges per acre, etc., no formal PUBLIC NOTICE, so designated by that name, was, so far as disclosed, formally published, under that name, until THE PUBLIC NOTICE of April 6, 1917 (Trans. Rec. p. 469)—

the appellees contending below and, no doubt, here that, whatever the dictionary or common meaning of the word thereupon may be, with the Secretary of the Interior it means some 13 years thereafter; the appellants contending that no public notice was necessary to fix and determine the charges per acre, and that, in any event, considering the publicity given the Pamphlet, Pltffs' Ex. 15 (Trans. Rec. pp. 215 to 288), and other public happenings, public notice was actually given to all interested parties within the meaning of the law.

g. On May 31, 1906, after its submission to the constituent members of the Association, a contract was entered into between the Association, in its corporate capacity, and the Secretary of the Interior (Trans. Rec. p. 41), whereby the Association undertook to promptly collect, or require prompt payment, and guaranteed payment for "that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders," in ten annual installments, the first payable "at the time of the completion of said proposed works"; with nothing more definite as to amount or time of payment. This contract is here for construction—appellants claiming that it should be read and construed in view of the law and the intention of the parties at the time of its execution; the appellees claiming it is unambiguous and speaks for itself.

h. The lands involved here are naturally divided into three different physical, or geographical, portions, designated Tracts A, B and C, in appellants' complaint (see map, opposite page), being,


DAM SITE
LAGUNA
T. 7 S.
CALIFORNIA
TRACT "A"
NORTH GILA LANDS
GILA RIVER
T. 8 S.
UNITED STATES
MEXICO
YUMA
TRACT "B"
SOUTH GILA LANDS
BLAISDELL
PACIFIC R.R.
ARROY
T. 9 S.
COLORADO RIVER
TRACT "C"
YUMA VALLEY LANDS
COMMERCIAL
YUMA MESA
R. 22 W.
R. 21 W.
T. 10 S.
R. 25 W.
R. 24 W.
R. 23 W.
UNITED STATES
MEXICO

# EXHIBIT "B"

respectively, the lands north of the Gila River, and south and east of the Colorado River; the lands south of the Gila River, and east of the Town of Yuma; and the lands east of the Colorado River, and southwest of Yuma; they being the lands constituting the "Lower Colorado Irrigation District" described in the Association's Articles of Incorporation, and the contract of May 31, 1906 (pages 39 and 41, Trans. Rec.). In Tract A considerable work was done, and irrigation water furnished by the Reclamation Service, as part of the project, for many years until the commencement of this suit below; nothing was ever done on the South Gila lands, except some levees erected in 1906, which were later abandoned. Tract C is practically completed except for the drainage system; it being a contested question here as to whether that feature is even now completed as originallyl proposed, and it was not completed at the filing of this suit below, nor at the time of the trial.

i. The contract, in writing, for the completion of the Laguna Dam, the most important and costly part of the Yuma Project, provided for its completion within two years—bearing out the oral promises of the engineers at the mass meeting of May 28, 1904 (p. 266 Trans. Rec.) and work was begun thereon on Aug. 1, 1905, there being a bond in $160,000.00 for its completion within two years p. 95 Trans. Rec., Defts' ans.), but in the early part of 1907 the contractor, by mutual consent, was released from the obligations of his contract and bond, when its contract was about one-half completed; the U. S. Reclamation Service taking the

work over, and thereafter prosecuting it, and practically all other work on the project, by what is known as "Force Account," down to the present time. "The proposed irrigation works" were not completed within two years from the commencement of the works, and they are not yet, as stated, physically completed, by about 40 per cent, as originally proposed—the appellees contending, and the Trial Court holding, that they are completed "for all practical purposes"—but work was carried on, after a fashion, for 12½ years until Tract C, ONLY, had reached such a stage of completion that the Secretary of the Interior deemed it completed, or practically completed, within the meaning of the law and the contract! (although as a fact, more than 19 miles of the main drainage canal in Tract C was yet to be built) and that thereby "the proposed irrigation works" were completed as a whole, and that the time had arrived to enforce the payment of the first annual installment of the cost, and under date of April 6, 1917, he issued a purported Public Notice (Trans. Rec. p. 469) to that effect, announcing the cancellation, on a future date, of all temporary water contracts with the individual landowners, under which irrigation waters had been furnished by the government to some of the lands involved for some years prior thereto, assumed to fix the charges at $75.00 per acre, and proclaimed that unless a certain form of contract (Trans. Rec. p. 48) were executed and delivered to the Project Manager at a certain future date all irrigation water would be denied to the lands belonging to such non-complying landowner—the lands thus denied water, of

course, being thereby rendered valueless, for at Yuma, Ariz., land without water is nothing. These threats affecting some landowners immediately, some others within a month or two, and all not later than Dec. 31, 1917. Those threats were to be, of course, put into effect by the defendants, they having control of the distribution of the water.

j. At the time of the issuance of the Public Notice, April 6, 1917, nor at the filing of this suit, July 1, 1917, nor on the granting of the Order for the Preliminary Injunction, July 6, 1917, no intimation, official or otherwise, had ever been given by the Secretary of the Interior, or any officer or employee of the U. S. Reclamation Service, that Tracts A and B, as delineated on the Plat, page 9, were not part of the project; but, on the contrary, in each and every Annual Report of the Secretary of the Interior to Congress, required to be made by Sec. 2 of the Reclamation Act, as to the cost, etc., of the work in progress, from the third, in December, 1904, until the fifteenth, in December, 1916. those tracts had been reported and treated as an integral and feasible parts of the Yuma Project.

6. Shortly after the issuance of the Public Notice of April 6, 1917, the plaintiffs instituted this suit in the U. S. District Court for Arizona, on July 1, 1917, the Association suing on its own behalf, and the plaintiffs Theilmann and Donovan suing on their own part, and on behalf of certain classes of landowners similarly situated to each of them, respectively; the complaint (Trans. Rec. p. 1 et seq.) setting out, among other matters, the Federal question involved; the rights of the plaintiffs in the lands involved; the power of the defendants

to irreparably injure the plaintiffs and their lands, because of their employment and control over the life-giving waters; the examination of and making of surveys upon the lands involved, under the Reclamation Act, by the Secretary of the Interior; his determination, upon full advice from the necessary maps, plans and estimates of cost, of the feasibility of the project, and the charges per acre—the ESTIMATED COST, at $35.28 per acre, on May 10, 1904; the setting aside of $3,000,000, in the Reclamation Fund for the construction of the project; the giving of the Public Notice as required by Sec. 4 of the Act; that the plaintiffs and their predecessors in title, and those for whom they sued, relying upon the determination and estimates of cost so made by the secretary, and the promises of the engineers, mortgaged their lands to secure the payment of the $35.28 per acre, which they otherwise would not have done; and that they would not have done so unless they believed in and relied upon the promises, express and implied, that the project was to be completed as a whole, and not as Tract C only; set forth the uncompleted condition of the project as a whole, set out the contract of May 31, 1906, in full (Trans. Rec. 41) and also appended a sample copy of the proposed Water-Right Application (p. 48 Trans. Rec.) which the defendants threatened to compel them to sign; showed the nature and extent of the irreparable injury threatened, unless plaintiffs should promise to pay $75 per acre construction charg, instead of $35.28, and to commence paying the $75 per acre on Dec. 1, 1917, when the project could not possibly be completed; and prayed for preliminary

and permanent Mandatory Injunctive relief, so that water would be supplied to plaintiffs' lands.

7. A Temporary, Mandatory Injunction was granted on July 6, 1917, compelling the defendants to serve water to certain of the plaintiffs who needed Summer water. At the end of 1917, by stipulation in open court, it was agreed that water should be furnished to all water users in Tract C, on their paying the operation and maintenance charges, until the final determination of the suit in the Trial Court, which remained in effect till the Final Decree on Feb. 26, 1920, which was against the plaintiffs on all points; but the Supersedeas Order of the Trial Court (Trans. Rec. pp. 566) provides for the supplying of water to the plaintiffs during the pendency of the appeal to the Circuit Court of Appeals, upon their paying the back construction charges from Dec. 1, 1917, at the rate of $40.00 per acre, the amount contended for by the appellants; which arrangement has been continued in effect by the Supersedeas Order of the Circuit Court of Appeals (Rec. p. 661).

8. During the Summer of 1917, by stipulation, the plaintiff Griffin was brought in as a plaintiff, on his own behalf and as representative of the water users in Tract A.

9. The plaintiffs were permitted to further amend their complaint at the commencement of the trial, April 28, 1918 (Trans. Rec. pp. 58 and 142), whereby the corporate plaintiff is suing herein specially for a large class of its constituent members who are homestead entrymen, who at divers times between May 10, 1904, until April 6, 1917, made

homestead entries of 160-acre (or less) tracts, and who are threatened with reduction in area of their holdings to a 40-acre farm unit, through the defendants refusing to furnish water for a larger area to any of that class of landowners. While, as heretofore pointed out, practically all of the lands involved were in private ownership when the project was launched, a large area was held by homestead or desert land entries, unaffected by the provisions of the Reclamation Act; and owing to the slow progress made in the construction of the project, extending over 12½ years, large numbers of entrymen were compelled to, and did, relinquish their entries, and, the lands being, from about July 1, 1902, withdrawn from all form of entry except as homesteads under the Reclamation Act, the new entrymen were compelled to re-enter subject to all the limitations, etc., of that act; and while on May 10, 1904, there were only a few scattering 160-acre tracts subject to these limitations, etc., by April 6, 1917, there were some 6,000 acres in Tract C alone which had been re-entered, and subject to the limitations, etc., of the Reclamation Act, the holders of which are threatened with reduction of area.

10. During the progress of the trial the defendants were permitted to introduce in evidence, over the objection of plaintiffs, their Exhibits 3 and 4 (Trans. Rec. 396-8); all dated subsequent to the commencement of this suit; and the principal witness for the defense, Director Davis, showed on cross-examination, without objection (Trans. Rec. p 446) that in 1918, long subsequent to the institution of this action, Imperial Irrigation District,

a California municipal corporation, supplying irrigation water from the Colorado River to large areas of land in California, entered into a contract with the United States to pay $1,600,000 for use of the Laguna Dam, the principal work of the Yuma Project; and the plaintiffs, as viewed by the witness, were not entitled to any credit on their construction charges because of that payment when made. Plaintiffs asked leave to file a supplemental pleading setting up those two sets of facts (Trans. Rec. p. 136-40) which was denied (Rec. 542). Testimony tending to show that the Secretary of the Interior made some oral promises as to the allowance of the $1,600,000 as a credit was admitted under Equity Rule 46 (Rec. 537 et seq.).

11. The contract in question originally provided for the payment of the construction charges in ten annual installments; which has been changed by operation of the Twenty-year Extension Act (Aug. 13, 1914, 38 Stat. 686); the plaintiffs accepting its terms as to time and rate of payment, with the consent of the Secretary of the Interior, and without prejudice to any rights here involved.

12. The defendants below objected to the jurisdiction of the Court, by moving to dismiss on the ground that the suit was reallly against the United States. This contention was overruled—on the authority of Magruder vs. Belle Fourche, 219 Fed., 72, and the cases there cited.

13. In the trial below defendants objected to practically all of plaintiffs' evidence (except the corporate plaintiff's Articles of Incorporation), and to each and every item thereof, on the general

grounds, only, of irrelevancy, immateriality and incompetency; but the evidence was heard subject to the objections to be later ruled upon. No such ruling was made, but in the consideration of the case the Trial Judge "admitted and carefully considered" all of plaintiffs' evidence (Trans. Rec. p. 561). The plaintiffs, in Sec. a of Par. 23B of their Complaint (Trans. Rec. p. 24) alleged that in any event, the charge of $75 per acre was grossly exorbitant, more than the works are worth, and more than the land could bear, one year with another; but in the trial of the case did not first proceed on that theory, but rather on the theory that whatever the works cost, or whatever they were worth, and whether the land could bear the charge or not, everyone was bound by the determination of the Secretary of the Interior made on May 10, 1904, fixing the charges at less than $40 per acre. But in the cross examination of plaintiffs' principal witness, Bondesson, the defendants were permitted, over the objection of plaintiffs, to draw forth testimony tending to show that lands were amply able to bear the burden of $75 per acre; and before closing their case plaintiffs offered to prove the allegations Sec. a, Par. 23A, of the Complaint (Trans. Rec. 371). The offer was refused, and error is predicated thereon.

14. THE QUESTIONS INVOLVED, assuming the jurisdiction of the Court, in the order of their importance, are:

a. Did the Secretary of the Interior in May, 1904, in accordance with Sec. 4 of the Reclamation Act, determine the ESTIMATED COST of the

Yuma Project at less than $40.00 per acre, thereby irrevocably fixing the charges per acre so that no higher charge could be enforced, as contended for by appellants; or, was the cost of the project determined by a public notice issued by another secretary, 13 years later, fixing it at $75.00 per acre, which must be paid, as appellees contend? Or, in other words, is the Estimated Cost to be paid, or shall there be paid the actual cost, or rather some arbitrary amount fixed by the Secretary of the Interior in his discretion, which is neither the estimated nor the actual cost?

b. Is the contract of May 31, 1906, ambiguous or unambiguous; and did the appellants' by entering into that contract waive and barter away their rights under the Reclamation Act; and must they pay for the project such charges as the Secretary of the Interior shall arbitrarily determine; notwithstanding that the law says that the Estimated Cost shall be returned?

c. Whatever the cost to be paid, $40, or $75 per acre, has the time arrived to pay the first installment thereof; in other words, have "the proposed works" been completed within the meaning of the contract?

d. In any view of the case, even though the Appellees may be right in all other contention, is it not inequitable and unjust to compel the appellants to execute and deliver the Water Right Application, the blank form of which is annexed to the complaint as Exhibit D (Rec. 48)?

e. May the Secretary of the Interior, after a homestead entryman has made entry of a full

quarter section of land, paid the fees and commissions thereon to the Receiver of the U. S. Land Office and fully complied with the homestead laws, offered and had accepted his final proof, and held the 160-acre tract for more than ten years, compel the entryman to reduce his area to one 40-acre farm unit, and to part title with the other three forties; and did the Lower Court err in ignoring that subject in its decision?

f. Did the Trial Court err in rejecting, admitting, and refusing to strike, certain evidence?

g. Did the Trial Court err in refusing to permit the plaintiffs to make a supplemental trial amendment of their complaint; and thereby preclude the plaintiffs from setting up, among other matters, an equitable setoff in the sum of $1,600,000?

h. Did the Trial Court err in finding and deciding certain facts to exist, contrary to the evidence?

i. With the general question, of course, did the Trial Court err in denying the relief prayed for; and did the Circuit Court of Appeals err in sustaining the Trial Court?

15. THE LAW APPLICABLE TO THIS CASE: a. The first and principal question—what shall be paid for the project, $40 or $75 per acre—will be answered by the interpretation and construction of Sections 2, 3 & 4 of the Reclamation Act (which, for the convenience of the Court are set forth at page 101 infra): b. The second question, as to whether the contract of May 31, 1906, is ambiguous or unambiguous, and if thereby the Appellants waived their rights to have collected from them, as the cost of the project, only the Estimated Cost,

rather than the actual cost, or the cost as arbitrarily fixed by he Secretary of the Interior, will be answered through the application of the ordinary rules governing the construction of contracts; the universal rule that the law is written into all contracts; and the express term of the contract itself that in all relations between the parties the rights of the Appellants are to be defined, determined and enjoyed by and under the Reclamation Act. c. The third question as to when the payments for the project should commence, whatever their amount, will be answered by determining if "the proposed works" have been completed within the meaning of the contract of May 31, 1906; after first determining what "the proposed works" are. d. The fourth question as to whether or not, in any view of the case, the appellees were not proceeding unlawfully, and inequitably and unjustly in attempting to compel appellants to execute and deliver the Water Right Application, will involve the scanning of the Reclamation Act and all amendments thereto, to ascertain if there is authority vested in the Secretary of the Interior, or any of his employes, to compel a land owner within a Reclamation Project to give away his property without compensation, under the guise of procuring a water-right application: e. The fifth question as to the right of the Secretary of the Interior to reduce in area the entries of the homesteaders, will be answered by the construction of Section 3 of the Reclamation Act; and a consideration of the acts of the Secretary thereunder; and, if he had not finally and conclusively acted long before the issuance of the Pub-

lic Notice of 1917, his long delay in acting at all, meanwhile permitting the entrymen to hold the maximum area. The other questions are to be solved by the ordinary Rules governing the trial of Equity cases.

All those questions were raised by objections and exceptions in the Trial Court; the successive appeals, and, now, the following:

## SPECIFICATION OF ERRORS

### First.

Appellants charge and allege that the United States Circuit Court of Appeals, for the Ninth Circuit, erred in affirming the Judgment and Decree of the United States District Court for the District of Arizona, for the reason that said District Court committed manifest error in the Trial of said cause, and in rendering and entering its judgment and decree in said cause, upon the following grounds, to-wit:

1.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Oscar P. Bondesson: (Trans. Rec. pp. 290 to 296).

"I farmed all the area of the land, and I grew alfalfa and grain crops, such as feterita, barley and cotton. My place is now rented.

"I rent my land for $30 cash per acre per year, and the lessee pays for the maintenance charge. I get for the rent of the land itself, and if there are any construction charges I pay them, but not the annual maintenance. I pay also my dues to the Water Users, which are nominal, very small, and taxes, annually. I am not paying a construction charge at the present time, as I am one of those who took advantage of the situation and made a temporary application for water service pending the determination of this suit."

"1916 was a year of large prices for produce. Cotton was beginning to be a pretty good price. As I remember it, I pastured my alfalfa lands in 1916, and received a gross revenue of close to thirty dollars per acre. That was gross.

"That was as to alfalfa, about one hundred acres or less was in alfalfa that year, and it brought me, as I remember it now, I little less than thirty dollars. It was pastured throughout the year to cattle.

"I am familiar with the regulations and actions of the Reclamation Service in securing crop returns every year; they used to come around for that purpose. I don't remember of having made any directly to them for the last two or three years, however, but I do remember that, say, three or four years ago they used to come around for that purpose. The water master used to come and ask about these things generally. I think that once or twice I made out those returns upon the regular card and furnished them to them. The card that you show me discloses that it is my card and in my handwriting, and that the returns for my land per acre for the year 1916, according to this card, was practically thirty dollars per acre for the alfalfa in round figures. There were sixty acres of cotton and seed. The gross return is shown to be $8,640 for cotton, $1,400 for cotton seed; in round numbers $10,000 for the sixty acres, gross return. The entire ranch would be a gross return of $13,000. The average value per acre stated to be $81.50.

"I do not recall the figures for the returns upon my place for the year 1917, but it was as large as that, if not a little more. 1917 was an exceptionallly good year on account of high prices, and in 1918 I received thirty dollars an acre rent. It was rented in 1918 and is now rented; the entire 160 acres for thirty dollars per acre for 1918 and for this year. The lease runs for three years, which is practically net to me, except taxes, interest on the investment and that sort of thing. I have no figures for the year 1915. The returns were very much less, however, than in 1916. In 1915 prices were just beginning to advance. I had no cotton in 1915, and that has been the big money crop really. I had alfalfa and grain crops, but it was a paying proposition in that year"

for the reason that all of said testimony was irrelevant and immaterial, and not proper cross-examination, and the nature and extent of the crops raised or not raised by the witness Bondesson in the years 1915-16-17-18 on his land within the Yuma Project, and whether or not such crops, if any, were raised at a profit or at a loss, and whether or not the witness Bondesson rented his said land for the years 1918, 1919 and 1920 at the sum of thirty dollars an acre, net, or whether he rented it at all, or not, could not, and did not, throw any light upon the questions involved in this case and the issues set forth in the pleadings, and did not tend to prove or disprove whether or not the Secretary of the Interior in the year 1904 made examinations and surveys for the location and construction of the Yuma Project! and whether or not said secretary determined that the Yuma Project was practical, and let contracts for the construction of the same; and whether or not he gave public notice as required by Section 4 of the Irrigation Act of June 17, 1902; and whether or not he estimated and determined at that time the cost of said Yuma Project and that such testimony could not, and did not, tend to prove or disprove whether or not the contract of May 31, 1906, annexed to plaintiff's complaint as Exhibit C, and introduced in evidence as defendants' Exhibit 7, was ambiguous; and did not tend to prove or disprove whether the project or the proposed works mentioned in said contract was completed April 6, 1917, or at the time of the trial; and for the further reason that the questions drawing forth said testimony were not proper cross-examination, the witness not having been interrogated by the plaintiffs as to any time or circumstances later than the year 1906, and said witness not having been interrogated as to what, if any, disposition he had made of his lands in the years 1915, 1916, 1917 and 1918, or at all; to all of which ruling of the Court in overruling plaintiffs' objection to said testimony and in admitting the same plaintiffs duly excepted to at the time.

2.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Oscar P. Bondesson (Rec. pp. 301-2):

Land had a value at that time of—well, it would depend on what state of cultivation it was in, or whether it was clear or level. I would say raw land at that time was worth about around twenty-five dollars up. As to cleared land it would depend upon the amount of labor that had been expended on it. Raw, unimproved land was worth right around twenty-five dollars and up on May 28, 1904.

for the reason that the value of lands within the Yuma Project on May 28, 1904, or whether they had any value at all, or not, was irrelevant and immaterial, and did not tend to prove or disprove any issues in this case, and the questions drawing forth said testimony were not proper cross-examination, for the reason that plaintiffs had not interrogated said witness as to the value of his lands, or any other lands, within the Yuma Project in the year 1904; and for all the other reasons set forth in the preceding Division No. I, which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said Division No. I, for a statement of said objections and wherein the Court erred in admitting the testimony set forth in this assignment of error; to which ruling of the Court in overruling the plaintiffs' objection to admitting said testimony, the plaintiffs duly excepted at the time.

3.

That said District Court erred in not granting plaintiffs' motion to strike all the testimony of the witness Bondesson set forth in the two preceding Divisions Nos. 1 and 2, for the reason and upon all the grounds set forth in the two preceding Divisions, Nos. 1 and 2, which are

hereby referred to and made a part of this Division, said grounds and reasons not being set forth here in full for the sake of brevity; and it is prayed that refernce may be had to said Divisions for the reasons in support of this Division; that plaintiffs now except to the refusal and failure to strike said testimony from the record plaintiffs' said motion to strike not being passed upon during the trial of this case, or at all, except in effect by the final decree dismissing plaintiffs' bill of complaint.

4.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, (Rec. 369-71) to-wit:

"Mr. Molloy: The plaintiffs offer to prove, and hereby avow their readiness and ability to prove by the testimony of numerous witnesses to the number of at least twenty, in addition to the testimonies of plaintiffs' witnesses hereto examined, that plaintiffs' exhibit 15 for identification, the certain pamphlet testified to by the plaintiffs' witnesses heretofore examined, was generally circulated amongst all of the landowners within the Lower Colorado Irrigation District on May 28th, 1904, and continuously thereafter until ninety-eight per centum of all of the land within the Lower Colorado Irrigation District had executed subscriptions for the capital stock of the plaintiff corporation by executing subscriptions for the capital stock of the plaintiff corporation by executing, acknowledging and delivering, each of them, an instrument similar in tenor and effect to the sample form thereof offered in evidence as plaintiffs' exhibit 14; and that at the mass meeting held in the town of Yuma, Arizona, on the night of May 28th, 1904, testified to by plaintiffs' witnesses heretofore examined, F. H. Newell, Chief Engineer of the U. S. Geological Survey, and J. B. Lippincott, Supervising

Engineer of U. S. Geological Survey, and each of them, stated and represented to the landowners assembled at said mass meeting, that they, the said Newell and the said Lippincott, and each of them, represented and there spoke for and on behalf of the Secretary of the Interior of the United States of America, and that the written statements and representations set forth in said exhibit 15 and the plat and drawings annexed thereto, were true and correct and could be relied upon, and that the Yuma Project as therein described and thereon delineated could and would be constructed, as a whole, within two years from the actual commencement of work thereon, at a cost of not to exceed $35.00 per acre, and possibly less, and that they, and each of them, the said Newell and the said Lippincott, would pledge, and did then and there pledge, their professional reputations as engineers, such as it was, that said project could be and would be so constructed within said time, and at said cost; and that each and all of said proferred witnesses, and each and all of the landowners present at said mass meeting believed in and relied upon the statements so made by these said engineers, and relied upon the statements, representations and delineations contained in said pamphlet, and the said land owners, and the said proffered witnesses, and each of them, were thereby induced to, and did, execute, acknowledge and deliver to Yuma County Water Users' Association, the plaintiff corporation, their subscriptions for stock identical with plaintiffs' exhibit 14, thereby placing a lien upon their land to secure the payment of the estimated cost of said project; and that if said witnesses, or said landowners, or either of them, had known or could have foreseen that the cost of said project would have exceeded the sum of $35.00 per acre, or, at the extreme outside, the sum of $40.00 per acre, and that said project would not be completed within two years from the time of commencement of work thereon, that they would not, nor would either of them, have executed or delivered said stock subscription agreements."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. 504-5).

**5.**

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence (Rec. 371-2), to-wit:

"Mr. Molloy: The plaintiffs' offer to prove, and hereby avow their readiness and ability to prove by the testimonies of numerous witnesses, not less than twenty-five, that the charge of $75.00 per acre provided for in the so-called public notice of April 6, 1917, concerning said Yuma Project, an unjust and inequitable burden upon the lands within said Yuma Project, and the owners thereof, and that said owners cannot afford to pay such charges, the same being more than said lands will bear, one year with another, taken over the period of time provided for the payment of the annual installments of the construction charge of said project; and that the same is, and will be, excessive, unjust and grossly exorbitant, and out of all proportion to, and greatly in excess of the actual value of the works constructed, or to be constructed, in said Yuma Project, for the irrigation and reclamation of said land; and that the charge of the sum of $1.50 per annum, for each acre of the land within Tract C, as described in the complaint, as a minimum operation and maintenance charge is, and will be inequitable, unjust, illegal, arbitrary, excessive and unreasonable and greatly in excess of the reasonable cost of the operation and maintenance of said project."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the

plaintiffs then and there duly excepted. (Trans. Rec. 504-5.)

6.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, to-wit:

"Mr. Molloy: Plaintiffs' offer to prove that there is within the limits of said Lower Colorado Irrigation District, as described in the complaint, some six thousand acres of land which was, on May 10, 1904, in private ownership, although within the exterior limits of certain withdrawals under the second form of withdrawal, according to the provisions of Reclamation Act of June 17, 1902, and of which said lands were thereafter, and prior to the commencement of this suit, relinquished to the United States and re-entered by homestead claimants under said Act, in tracts of 160 acres, and of other areas greater than 40 acres, for which the Register and Receiver of the Phoenix, Arizona, land office, received and accepted the fees required by law for the entry as homesteads and of said respective tracts so re-entered, and that said new entrymen have been permitted by the Secretary of the Interior to hold all of the areas so re-entered as homesteads without diminution or confirmation to a farm unit for a great number of years in each of said respective cases, to-wit: The period of ten years, including John W. Hevener and his homestead entry for the northwest quarter of Section 17, Township 10 South, Range 24 west, G. & S. R. Meridian, in Yuma County, Arizona, and many others similarly situated to said Havener."

to which said ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. p. 504-5.)

7.

That said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Arthur P. Davis. (Trans. Rec. 379 to 385).

"Briefly, the reasons for the additional cost of the project were three: The first is the unexpected conditions that developed as to poor rock and some other physical conditions; the difficulty in dealing with the rivers which were then not so well known as now, and other minor physical difficulties. Second, the change in industrial conditions which was very important. There was a very rapid increase in the price of labor, price of material, and especially in the scarcity of efficient labor. That was one of the chief difficulties the contractor had which led almost to his ruin and calamity in October, 1907, when there was an industrial collapse. It had been greatly hastened by the destruction of San Francisco, which in its building in 1906 and 1907 absorbed building materials and labor which affected greatly the western part of the country. The conditions were generally changed, the plans were changed in order to make a better project and more endurable project, one of the features being substitution of the siphon under the Colorado River for one under the Gila, which was decided upon for the reasons there were very grave doubts of maintaining such a crossing on the Gila River The original plans provided that the main canal which was to serve the entire Arizona side of the project, including the Lower Yuma Valley, should be built on the Arizona side and it involved a crossing of the Gila River and a large mileage of the canal in the valley of the Gila River where it might be attacked by that stream when in flood, and if reached would deprive the entire lower valley and a portion of the upper valley of any water for irrigation and in a high, arid climate of this kind that was a very serious jeopardy. Largely to avoid that jeopardy the crossing plans were changed and the

main canal was finally built on the California side and the portion to water the lower Gila Valley was brought through a siphon under the Colorado River just below the city of Yuma. Another change was that a very much larger mileage of canals was built than was shown on the plat which has been placed in evidence here; approximately, I think, four times the mileage, although the increased mileage was of small conveyance merely. And it is those canals that contain a large number of small wooden structures. The main structures on the Yuma Project being of a permanent nature. That policy is one which we have developed with the experience of surveys, and observations of other works, as being the wise one. Technically there was no change in hours of labor.

The law was not changed. The original Reclamation Act contains a paragraph requiring eight hours to constitute a day's labor for a common labor—labor of mechanics, but it was a practice in those days for contractors to make agreements with their men and work them ten hours and they probably made their bids on that basis. At any rate that was the practice and J. G. White & Company began that practice and carried it on for some time and were arrested by the local authorities and I understood paid a fine and had to discontinue it and work men eight hours. They had great difficulty in securing labor which was one of the strongest items involved in the increased cost of the Laguna Dam, and another cause the increased difficulty of navigating the Colorado River. The contractors began, I believe, first to do some freighting on the Arizona side and found that the Gila River interrupted his traffic frequently, or for other reasons he changed to the river for navigation, but the Colorado River broke into Imperial Valley and began cutting its channel very rapidly and the effect of that cutting reached back well into the Yuma Valley. I mean cutting the bottom lower and lower. The river in its former position reached sea level and at the Gulf of California, something over a

hundred miles below Yuma, and by changing in approximately the same distance or perhaps a less distance, reached an elevation practically two hundred and fifty feet lower than sea level, so that it had a very great declivity. It cut great, deep gorges through the Imperial Valley and caused cataracts which were undermined by the high velocity causing deep gorges. The effects of that reached up, I don't know how far, but above the city of Yuma. I know that from my experience in navigating the Colorado River. Prior to that cutting the Colorado River was being navigated to the Laguna Dam and above, after the cutting I found it impossible to so navigate it. It formed a series of rapids which prevented the passing of the boats. I know for I was on a boat with a good pilot that could not pass, and we spent many hours there. That and other difficulties led to the abandonment of the navigation of the river and to the construction of a wagon road on the California side by which considerable freight was hauled to the dam. Those three methods, a road on the Arizona side, navigation of the river and a road on the Colorado side, were the methods that had been used for freighting to the dam during the pendency of the work of the contractor—during the progress of the work of the contractor at the Laguna Dam. There was no railroad constructed by the contractor. When the Government took over project upon the failure of the contractor, the experience therefore had by him demonstrated that those methods of transportation were not only enormously expensive but ineffective, and had contributed largely to his loss and at last it was decided that a railroad must be built and such a railroad was built under the auspices of the Government. That railroad is in existence and is used for occasional travel, for hauling rock from the Colorado River to the dam and maintenance of levees in the lower valley and upper valley, also for taking such material as required to the Laguna Dam.

The effect of all these things was to greatly increase the cost of the dam under any management, irrespective of the cost of management. Other portions of the project were affected in the same way:

for the reason and upon the ground that it was irrelevant and immaterial what the actual cost of the Yuma Project was, or should have been, the Secretary of the Interior having, in the year 1904, under the provisions of the Reclamation Act of July 17, 1902 (32 Stats. 388), determined the estimated cost of the Yuma Phoject, and said act providing that such estimated cost and not the actual cost should be returned to the Reclamation Fund, and it will now be inequitable and wrongful, after the plalintiffs in this case, and those for whom they sue herein, have mortgaged their lands to secure payment of the estimated cost, as so fixed and determined by the Secretary of the Interior and not the actual cost, to permit the defendants, thirteen years after the cost of the Yuma Project has been estimated according to law to levy on the lands of the plaintiffs, and those for whom they sue, a charge of more than double the estimated cost; to which ruling of the Court in overruling plaintiffs' objections to said testimony and in admitting said testimony the plaintiffs duly excepted at the time.

8.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Arthur P. Davis: (Trans. Rec. 385-391.)

At the time of the meeting of May 28th, 1904, there were no surveys or locations of anything that anybody regarded as permanent. There were approximate locations of some features. The principal feature of that character being the Laguna Dam, but even that was subject to change, not only in location but design, and was subsequently changed in design and I think in

location. There was not at the time a definite determination of the irrigable area in Lower Colorado Irrigation District.

It was the area in which we were endeavoring to work out and had tentatively worked out a feasible irrigation project in which we had made an attempt to approximate the acreage that could be covered and the works that would be necessary for that and their probable cost.

Since May 31, 1906, the irrigable area of the project has been determined approximately.

The area of the so-called north and south Gila Valleys, also referred to in the complaint as Tracts A and B of the Lower Colorado Irrigation District, were withdrawn from entry in the early days, but have since been restored to entry, the purpose of the withdrawal was to prevent prior entry before the proper time, pending examination and the determination of the feasibility of the project and the final action even if not feasible. The purpose of the restoration was the last step in the abandonment of that part of the project as far as irrigation was concerned by this project.

The Court: In other words, when you determined it was not practical to irrigate they were restored to entry?

Witness: Not immediately. It is a custom of the Irrigation Service to not restore lands while there may be danger of people being misled into filing upon the land and we have frequently held lands beyond the time of the actual needs of the act for that reason.

The Court: In any event you determined it was not feasible to include them within the project?

A. Yes, and that was the purpose of the restoration. the reason for it.

As to the North and South Gila:

This map has upon it in dotted lines the course pursued at various times by the Colorado River and the Gila River. That color in yellow shows the course of the Colorado River in 1903 and the course of the Gila River along the lower line. The red line indicates the

boundary and the course of the Colorado River in the upper part and the Gila River in the lower part of 1907; and the various dotted lines show the various peregrinations and meanderings of the rivers in the early days. Now this shows that in 1903 the Colorado River ran along the yellow line which is far to the north of where it afterwards came and by its cutting to the southward, it cut off the land which has been intended to be occupied by levees and the canals. At the same time the meanderings of the Gila River showed its erratic disposition and also the Gila was a much more difficult river to control than the Colorado for the reason the Colorado rises slowly and gives warning. That is not true of the Gila. It also in extreme floods discharges more water and at a higher velocity than the Colorado. For those reasons it is far harder to control the Gila than the Colorado. That is the principal reason for this change. Another is—

The Court: Where is that land in question?

A. It is this area in here (indicating on map).

The Court: Omitted from the project?

A. Between this river and the Yuma mesa (indicating on map).

The Court: You were asked to state why it was not practical to include that in the project as originally planned.

A. One reason is the impracticability of controlling the Gila River by means of levees. Without levees these valleys will all overflow and their cultivation will be so precarious that we don't consider it feasible for the part nearest the river. Some of the higher lands may be cultivated but only a very small area for the same reason of the erratic condition and impracticability of controlling the Gila River within the limits of expense, which made it necessary to bring the main canal of the Yuma Project down the river from the Laguna Dam.

Removing the main canal to the western side of the river, or the location of it before the construction, and

crossing the Colorado River was due largely to this impracticability of controlling the Gila River so not to wipe out the crossing.

The Court: Was it ever contemplated that you would control either one of these rivers with levees?

A. Yes. Levees have been built in the valleys and this levee on the eastern bank of the Colorado is still in existence.

The Court: Do you mean the levees here (indicating on map)?

A. In a general way it is parallel with the river, but the original location of that levee has been obliterated and the present course is shown on the map and marked "Levee."

The Court: This levee here along the red line?

A. No, the levee is along the Gila land shown on this map. Every time that river goes in flood it changes some part of its course and frequently very radically. Now, the removal of the main canal to the west side of the river which was necessitated by the erratic habits of the Gila River, made it impossible to cover by gravity as large an area for the reason that a canal with very large discharge requires much less grade than a canal of small discharge so that a canal on the smallest practical grade and with a capacity proper for the irrigtion of irrigable land in the Gila Valley follows a course roughly parallel, but lower than the original main canal and crosses the Gila river in the neighborhood of Sections 16 and 21. I have another map with the course sketched; that blue line (indicating on map). The blue line on this map shows the approximate location of the canal headed at the Laguna Dam carrying sufficient water for the two Gila Valleys and reaching to the neighborhood of Yuma. It leaves out a large portion of the upper part of both valleys; a portion of the North Gila Valley having also been eliminated by the changes in the Colorado River reduced this acreage to only thirty-five hundred that can be irrigated by gravity. That area can be reached by pumping. That

so radically changed the areas, on the basis of our knowledge in 1904, that in my opinion the system is not a feasible system.

Another reason is one developed since that date. We found that the Colorado River passes freely under the levee and at the time of high waters appears on the surface, so that the construction and maintenance of levees does not protect them from overflow. It makes it necessary if they are to be irrigated to provide them with drainage canals of very large capacity, the water from which must be pumped into the river. We have had a very expensive and serious experience on the opposite side of the river, and where the Secretary of the Interior in an effort to do justice has allowed the people to abandon their claims and take up under preference homesteads in the lower Yuma Valley in exchange. And they have suffered serious loss.

for the reason and upon the ground that such testimony is irrelevant and immaterial as the examinations and surveys of the Yuma Project had been duly made under the provisions of the Reclamation Act of June 17, 1902, as conclusively shown by the evidence in this case, in the years 1902, 1903 and 1904, and prior to May 10, 1904, by the Secretary of the Interior for the purpose of locating and constructing said Yuma Project, and that upon such examinations and surveys the Secretary of the Interior had, on May 10, 1904, determined the feasibility and practicability of said Yuma Project, and all thereof, including the North and South Gila Valleys, described in plaintiffs' complaint as Tracts A and B, respectively; and did thereafter duly let contracts for the construction thereof; and any opinion of the witness Davis in 1919 as to whether or not said project was then or on April 6, 1917, feasible and practicable is irrelevant and immaterial and an attempt to impeach and impair an official and judicial determintion of his superior officer, the Secretary of the Interior, made in 1904, when such officer had jurisdiction to so determine

and estimate. And upon the further ground that it is irrelevant and immaterial what was the significance of the acquisition (if there was an acquisition) of the Lower Colorado Irrigation District, for the reason that all such questions and negotiations were merged in the written contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7; and said testimony of said witness was an attempt to vary the terms of said written instrument by parole. And for the further reasons that all the surveys and plans referred to in said testimony had been reduced to writing, and the plan and surveys themselves were the best evidence; to which ruling of the Court in overruling plaintiffs' objections to the introduction of said testimony and in admitting its introduction, the plainitffs duly excepted at the time.

9.

That said District Court erred in admitting, over plaintiffs' objections, the following testimony of the witness Arthur P. Davis (Trans. Rec. 401-2):

Witness: We began the construction of the drainage canal in the lower valley some time ago. I don't remember how long ago—over two years—and immediately a protest was set up by the people in the valley against it, whose judgment was, it was not needed. Written objections were made to the Secretary of the Interior and referred to me, and written objections were made to me personally and I requested and urged to go to the Yuma Valley and hear representations on the subject, and I was there in Yuma visited by a large representation of the farmers of the Yuma Valley, most if not all of whom were members of the Water Users' Association and some I believe were officers thereof. They presented me with a stack of cards, and a petition in strong terms requesting that the drainage be stopped and abandoned, and very strong representa-

tions were made to me at the same time to the same effect, and we at that time had two dredges in the valley, one was at work and the other about to be put to work. I was of the opinion that the time for beginning had arrived; that something had already developed and it might be carried forward slowly and it was my intention to have two dredges there and perhaps order others if needed, but owing to those protests, having already started one dredge, we confined our operations to one dredge, and in this meeting I explained the operation with the idea that when we got to a certain point in the valley we would stop.

for that reason that said testimony is hearsay; to which ruling of the Court in overruling plaintiffs' objections to said testimony, and in admitting the same, the plaintiffs duly excepted.

10.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of Arthur P. Davis (Trans. Rec. 404-7):

Assuming that the public notice of April 6, 1917, had been postponed until the completion of the piece of drain referred to by the witness Bondesson, the drainage system would not even then be completed. I think it will not be in my lifetime that no more drainage will be necessary. The mere building of the main drain is but an important start on that work. The construction of the main drain will by no means involve the drainage problem in Lower Colorado Valley. If the extra piece of drain referred to by Bondesson were completed, something else would arise—speculative, it is true. As a whole the project is in a completed condition in the Lower Colorado Valley, as a practical matter, in the only sense in which it is completed, or ever will be completed, and that state was arrived at a considerable time before the issuance of the public notice of April

17, 1917. By a practical matter I mean that the delivery of water, and the facilities for the delivery of water and irrigating and cultivating land are excellent and hard to beat; that the drainage has been kept close up to the limit of practical economical construction, and that no considerable portion of the land in the lower valley, as irrigation projects go, has ever been impractical of cultivation or irrigation by reason of delay of drainage. There probably—not be any additional drainage necessary:

for the reason and upon the grounds that said testimony was irrelevant and immaterial and too speculative, it not tending to prove or disprove whether or not the proposed works of the Yuma Project as set forth and described in the contract of May 31, 1906, annexed to plaintffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed or uncompleted at the time of the institution of this suit, or at the time of the trial; what will happen in the future or subsequent to the trial herein could not tend to throw any light upon what had happened on April 6, 1917, the date of the so-called public notice involved in this suit; to which ruling of the Court in overruling plaintiffs' objection to the admission of said testimony, and in admitting it, the plaintiffs duly excepted at the time.

11.

That said District Court erred in admitting over the objections of the plaintiffs the following testimony of the witness Joseph B. Lippincott (Rec. 606):

Q. Now what you have stated is all you have to base your opinion upon that the Yuma Project is finished?

A. No, sir; no, sir.

By the Yuma Project I mean the Yuma Project as finally adopted by the Secretary of the Interior. The fact that the Yuma Valley is a going business, going farming community, the fact that the lands are highly

improved, the fact that the whole unit shows the successful operations of farming in that valley, paved roads and good houses, and fields under intensive cultivation, the fact that the farmers of this region are apparently able to successfully carry on farming operations under irrigation. In fact, the Yuma Valley presents to me one of the most prosperous and successful farming demonstrations that I have seen in this country. I would say as far as the cultivation of lands by irrigation in this Yuma Valley is concerned that the project was finished. There doubtless will be many things to do in the future. I doubt if the time will ever arrive—not arrive in my lifetime, when construction work is no longer necessary in the Yuma Valley, just as the time never seems to arrive when the construction work on these big transcontinental railroads has reached their final completion, and the project is a finished project in my judgment in that the landowners of that community are able very successfully to carry on the business for which that project was designed

for the reason and upon the grounds that said testimony was not responsive to the questions asked and was not within the scope of the cross-examination of the witness, and such testimony did not tend to prove or disprove whether or not the proposed works of the Yuma project mentioned in the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed, and the evidences of prosperity testified to by said witness is no evidence whatsoever that the Yuma Project was completed as a physical fact; to which ruling of the Court in overruling plaintiffs' objection to said testimony, and in admitting it, the plaintiffs then and there duly excepted.

12.

That said District Court erred in denying plaintiffs' motion to strike from the record the testimony of the

witness Joseph B. Lippincott, set forth in the preceding Division No. 11, to which reference is hereby made for the sake of brevity, for the reasons and upon the grounds set forth in said preceding Division, which reasons and grounds are not herein set forth for the sake of brevity, but it is prayed that reference may be made to said Division; to which ruling of the Court in denying said motion the plaintiffs then and there duly excepted. (Rec. p. 490.)

13.

That said District Court erred in refusing at the close of the evidence in the trial of this case, to grant leave to the plaintiffs to file a supplementary pleading herein in words and figures, as follows, to-wit: (Trans. Rec. 542-3).

(Title of Court and Cause)

(Trans. Rec., p. 138)

Plaintiffs complain, and allege, and respectfully show, the Court, that, as plaintiffs are infromed and believes, since the commencement of this suit and in the summer of 1917, the Secretary of the Interior did make certain orders whereby he purported to declare and determine that the Yuma project or Reclamation Service as embraced within the lower Colorado Irrigation District, as described in the complaint, was then and there completed and finished, notwithstanding that certain portions thereof, to wit, tracts A and B, as set forth, described and delineated in the complaint, had not been in any manner physically reclaimed, as more particularly set forth in said complaint, and notwithstanding that the drainage system of Tract C, as described in the complaint, had not been completed; that as plaintiffs are informed and believe, the said orders so made by the Secretary of Interior, were made for the purpose of affecting the ultimate adjudication of this suit, and were made by the Secretary of the Interior without due and

proper investigation, and without jurisdiction, for the reason that the Secretary of the Interior had, many times from the year 1904 until the end of the year 1916, declared and determined that said portions of the Yuma Project were feasible, practical and advisable, and in fact said portions were, at the time of making said orders and each of them, feasible practicable and advisable of construction as originally planned and determined by the Secretary of the Interior in the year 1904; and the Secretary of the Interior was not, in the Summer of the year, 1917, in possession of any facts or information that would justify the making of said orders, or either of them; and that the making of said orders was without the jurisdiction of the Secretary of the Interior, and in violation of the letter and spirit of the contract entered into between plaintiffs corporation and the United States of America, on May 31, 1906, a copy of which is annexed to the complaint herein as an exhibit and the said orders, and the making thereof, was and is an abuse of any and all discretion vested in the Secretary of the Interior by law, or at all; and it would be inequitable and unjust to permit the defendants in this case to deprive the plaintiffs herein of the use of irrigating water in the manner described in the complaint, or at all, because of the making of said orders.

2. That, as plaintiffs are informed and believe, in the year 1918, and subsequent to the commencement of this suit, the Secretary of the Interior, acting for and in behalf of the United States of America, entered into a certain written agreement with Imperial Irrigation District, a municipal corporation of the State of California, whereby the said municipal corporation promised and agreed to pay to the United States of America, the sum of One Million Six Hundred Thousand Dollars, for certain rights and privileges in the use of and taking of water from the Laguna Dam of the Yuma project of the United States Reclamation Service, whereupon the Secretary of the Interior, acting for and on behalf

of the United States of America, promised and agreed to and with the plaintiff corporation, acting through and by its duly authorized representative, one Mulford Winsor, that said sum of One Million Six Hundred Thousand Dollars, so agreed to be paid by said Imperial Irrigation District to the United States of America, should be and would be credited to the land owners within Tract C of the Yuma Project, otherwise the Lower Yuma Valley, as described in the complaint, upon the amounts declared to be due upon their lands for the cost and expense of said Yuma Project in the same proportion as the cost of the Laguna Dam of said project had been pro rated upon the lands of the said land owners; for which reason it would be unjust and inequitable to permit the defendants in this suit to deprive the plaintiffs of the use of irrigating water in the manner described in the complaint, or at all.

Wherefore, plaintiffs pray that they have the relief prayed for in the complaint filed herein.

THOS. D. MOLLOY,
Solicitor for Plaintiffs.

(Duly verified.)

for the reason and upon the ground that such refusal was in abuse of the discretion of said Court, said pleading being necessary and proper, as it set up matters and things that had occurred since the filing of the original complaint herein, and prepared to meet and set forth a defense created by the defendants and their superior officers subsequent to the filing of the complaint herein, and that the second paragraph thereof set forth an equitable defense against the charge of seventy-five dollars per acre, even if such an amount had been the estimated cost as originally determined by the Secretary of the Interior; to which ruling of the Court in refusing permission to file said pleading plaintiffs thereupon duly excepted. (Trans. Rec. p. 543.)

14.

That said District Court erred in finding and deciding (Trans. Rec. p. 555) that the Yuma Project has cost greatly in excess of the estimate by the engineers, it being irrelevant and immaterial whether or not the actual cost is greatly, or at all, in excess of the estimates made by the engineers, for the reason that Section 4 of the said Reclamation Act requires and determines the amount to be repaid into the Reclamation Fund as the estimated cost originally made by the Secretary of the Interior; in any event, there was not sufficient, or any, evidence before the court establishing the fact that the actual cost greatly or at all, exceeded the estimated cost, said District Court having ruled and decided during the progress of the trial that it did not care to hear any evidence as to the actual cost of the project, and Section 4 of said Reclamation Act of June 17, 1902, requiring that the estimated cost and not the actual cost be repaid.

15.

That said District Court erred in finding and deciding (Trans. Rec. p. 561) that the testimony in this case shows that the annual net revenue per acre of the lands within the Yuma Project is almost equal to the cost per acre of the project; there being no evidence whatsoever in this case as to the rental value of any lands whatsoever within the Yuma Project, except as to one tract of land belonging to the witness Oscar P. Bondesson; such finding being against the evidence and unsupported by the evidence.

16.

That said District Court erred in not passing and deciding upon plaintiffs' contention set forth in their amended pleading filed at the commencement of the trial in this case on April 28, 1919, wherein the plaintiff association sued and contended for and on behalf of

certain of its constituent members who made homestead entries subsequent to the commencement of the Yuma Project and after the lands therein had been withdrawn from all form of entry, except homestead entries, under the provisions of said Reclamation Act, and who are the owners and holders of larger areas of land embraced in said entries than would be permitted to be held by them according to the terms of the so-called public notice of April 6, 1907, defendants' Exhibit 8, which attempts to reduce the holdings of said entrymen to a farm unit of the area of forty acres, or less, notwithstanding that by operation of law and the acceptance of the filing fees and commission for larger areas than forty ~~years~~ acres, and the Secretary of the Interior permitting said entrymen to hold their said lands for long periods of years, the area per entry of each and all of said entries had been fixed and determined at a greater area than forty acres; and the evidence in this case in any event shows that the Secretary of the Interior had, in the year 1910, fixed the area of farm units in said Yuma Project at eighty acres per entry; and erred in finding and deciding, in effect, against said contentions by entering its decree dismissing plaintffs' bill.

17.

That said District Court erred in finding and deciding (Trans. Rec. 556) that this case is governed by the decision in the case in the U. S. District Court in and for the District of Idaho, namely, Payette-Boise Water Users' Association vs. D. W. Cole, et al., for the reason that the evidence in the stated case shows conclusively that the settlers and land owners within the Payette-Boise Project waived their rights under Section 4 of said Reclamation Act of June 17, 1902, while in this case it has not been proved, nor attempted to be proved, that the plaintiffs in this case, or any of them, waived their rights under Section 4 of said Reclamation Act to have granted to them a water right at the estimated cost of less than forty dollars per acre.

18.

That said District Court erred in finding and deciding (Trans. Rec. 559) that the case of Swigart vs. Baker, 229 U. S. 187, is controlling in this case, for the reason that the questions here involved were not before the Supreme Court of the United States for decision or adjudication in that case, and anything therein decided was dictum as far as this case is concerned; and that the U. S. Supreme Court, in the Swigart-Baker case, did not pass upon or construe Sections, 2, 3 and 4 of the Reclamation Act of June 17, 1902, which are involved in this case.

19.

That said District Court erred in finding and deciding (Trans. Rec. p. 553), that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands benefitted, and that such cost, when collected should be paid into the Reclamation Fund to replenish its fund, and thereby make irrigation at least a self-sustaining enterprise; such finding and decision being contrary to the provisions of Section 2, 3 and 4 of said Reclamation Act of June 17, 1902. (32 Stat. 388.)

20.

That said District Court erred in finding and deciding (Trans. Rec. p. 553) that it cannot be supposed that the estimated cost based "on opinion and roughly made from imperfect data," such only as was available in laying out work on a large scale is all that the land owners can be required to pay regardless of the actual cost of the project; that to place such a construction on the Reclamation Act would in effect nullify it and defeat its every purpose; that it was the purpose of Congress to require the charges to be equitably apportioned with a view of returning to the Reclamation Fund the entire cost of construction thereof, and that the term

"estimated cost" must be interpreted and construed in the light of the objects and purposes sought to be accomplished, and of the situation surrounding the proposed project during and at the time the preliminary examinations and surveys were being made; said finding, decision and construction of law being contrary to the letter and spirit of the Reclamation Act of June 17, 1902, and particularly Sections 2, 3 and 4 thereof.

21.

That the said District Court erred in finding and deciding (Trans. Rec. p. 554) that the estimated cost of the Yuma Project is the cost as finally announced by the Secretary of the Interior on April 6, 1917, for the reason that the evidence conclusively shows that the Secretary of the Interior did, on or about May 10, 1904, and some thirteen years prior to April 6, 1917, fix and determine the estimated cost of the Yuma Project at less than forty dollars per acre; such finding being unsupported by the evidence and against the evidence, and contrary to the letter and spirit of the Reclamation Act of June 17, 1902.

22.

That said District Court erred in finding and deciding (Trans. Rec. p. 560) that the Secretary of the Interior did not make an estimate of the cost of the Yuma Project on May 10, 1904, and in finding and deciding that the circulation among the landowners and settlers within the Yuma Project in May, 1904, of a certain pamphlet containing letters, reports and estimates, did not constitute a public notice within the meaning of the Reclamation Act; and in finding and deciding that the public notice was the one given April 6, 1917; the evidence in this case conclusively showing that the Secretary of the Interior did estimate and determine the cost of the Yuma Project on May 10, 1904, and did thereafter, on May 28, 1904, and continuously until May 31, 1906, in compliance with Section 4 of the Reclama-

tion Act of June 17, 1902, give public notice of the lands irrigable under said project, and of the charges which should be made per acre upon the entries and private lands therein, together with the number of annual installments in which said charges should be paid, and the time when such payments should commence.

23.

That said District Court erred in finding and deciding (Trans. Rec. p. 560) that the contract of May 31, 1906, Exhibit "C" annexed to plaintiffs' complaint, and defendants' Exhibit 7, means, or should be construed as meaning and expressing, that the plaintiffs are bound thereby to pay that part of the cost of the Yuma Project attempted to be apportioned thereto by the Secretary of the Interior by the so-called public notice of April 6, 1917; for the reason that said contract should be construed to have written into it the express terms of Section 4 of the Reclamation Act of June 17, 1906, whereby it is prescribed that the estimated cost of the project shall be returned to the Reclamation Fund; and the evidence in this case conclusively shows that the cost of the Yuma Project was estimated and determined on May 10, 1904, by the Secretary of the Interior; and erred in finding and deciding that said contract provides by its terms that the payments to be return to the Reclamation Fund for the construction of the Yuma Project are now due and payable; said contract providing by the express terms that the payments shall not begin until the Yuma Project is completed; and the evidence in this case conclusively showing that said Yuma Project is not yet completed.

24.

That said District Court erred in finding and deciding (Trans. Rec. p. 564) that the Yuma Project from a practical standpoint, or at all, was completed on April 6, 1917; the evidence in this case conclusively showing that said project was not completed on April 6, 1917,

and that it is not now completed, and there being no evidence whatsoever proving or tending to prove that said project is completed or that it was completed April 6, 1917.

25.

That the United States District Court for the District of Arizona erred in adjudging and decreeing (Trans. Rec. p. 565) that plaintiffs' bill of complaint herein be dismissed, thereby denying the plaintiffs the equitable relief prayed for in their complaint herein, such decree and judgment not being supported by the evidence, and being against the weight of the evidence, and being contrary to law and equity, in the following particulars, to-wit:

(a) That said judgment and decree is unsupported by the evidence, and is contrary to the weight of the evidence in this, that the contract which is annexed to plaintiffs' complaint as Exhibit "C" thereto, and in evidence herein as defendants' Exhibit 7, provides, according to its express terms, that the payments for the water rights to be issued to the shareholders of the plaintiff association, under the provisions of the Reclamation Act of Congress, June 17, 1902 (32 Stat. 388), should not be begun to be made until the completion of the proposed reclamation works of the Yuma Project of the United States Reclamation Service, the subject of said contract; and the evidence in this case conclusively proves and shows that said proposed works were not completed at the time of the institution of this suit, and are not now completed; and the defendants were attempting to, at the time of the institution of his suit, and will, unless enjoined by this court, unlawfully and wrongfully compel the plaintiffs to commence making such payments prior to the completion of said proposed works, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(b) That said Reclamation Act of June 17, 1902, provides, among other things, that the charges which shall be made per acre upon lands within the United States Reclamation Projects, including the Yuma Project, which is the subject of this suit, shall be determined with the view of returning to the Reclamation Fund the estimated cost of the construction of the project; and the evidence in this case conclusively shows that the estimated cost of said Yuma Project, as fixed and determined by Secretary of the Interior in accordance with said act, is less than the sum of forty dollars per acre, and the defendants in this case were, at the time of the institution of this suit, unlawfully attempting to, and will, unless enjoined by this court, wrongfully compel the plaintiffs to pay the sum of seventy-five dollars per acre as the cost of said project, by unlawful and inequitable means, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(c) That the evidence in this case shows and proves that it was at the time of the institution of this suit, and now is, the duty of the defendants continue to supply irrigating water to the lands of the plaintiff Archie J. Griffin, and those for whom he sued herein, situated in Tract A as described in the complaint herein; and that the defendants have unlawfully and wrongfully shut off, and refused to deliver, irrigating water onto the said lands, and will continue to shut off and refuse to deliver such water to said lands to the great and irreparable injury and damage of the plaintiff Griffin and those for whom he sues herein, and the plaintiff Yuma County Water Users' Association.

(d) That the evidence in this case shows and proves that the entrymen who are constituent members of the

plaintiff Yuma County Water Users' Association, and for whom said Association is suing herein, as paritcularly described and set forth in plaintiffs' amended pleading filed with leave of court on April 28, 1919, at the commencement of the trial herein, are lawfullly entitled to hold the full areas of their, and each of their, respective entries, and the defendants were at the time of the institution of this suit unlawfully and wrongfully attempting to compel said entrymen to reduce each of their respective entries to forty acres in area, and the defendants will, unless enjoined by this court, continue to wrongfully and unlawfully attempt to compel said entrymen to so reduce their said entries, by wrongfully and unlawfully shutting off and refusing to supply to said entrymen irrigating water for the lands embraced in their respective entries, to the great and irreparable injury of the said entrymen.

(e) That the evidence shows that the defendants were proceeding, and will proceed, unless restrained by this court, to unlawfully and wrongfully shut off irrigating water from the lands of all the plaintiffs and those for whom they sue herein to their great and irreparable injury and damage, and that in law, justice and equity the plaintiffs are entitled to the relief prayed for in their complaint; and said court erred in not granting the relief prayed for, and in not perpetually restraining and enjoining the defendants from shutting off and refusing to supply irrigating water to said lands, and in not otherwise doing equity as prayed for.

(f) That the evidence and pleadings herein conclusively show that the defendants were, at the time of the institution of this suit, unlawfully attempting, and will, unless restrained and enjoined by this court, continue to unlawfully attempt to compel the plaintiffs, and those for whom they sue herein, to execute and deliver

to them an unlawful, unconscionable and inequitable contract, which would have the effect, among other bad effects, of depriving them, and each of them, of their, and each of their, property for a public purpose without compensation and due process of law, in violation of the Constitution and laws of the United States and the State of Arizona, a copy of which contract is annexed to plaintiffs' complaint as Exhibit "D" thereto, and in evidence as defendants' Exhibit 16, by threatening to shut off the supply of irrigating water from their lands, to their great and irreparable injury and damage.

26.

That said District Court erred in not granting the releif prayed for in plaintiffs' complaint, for all the reasons and upon all the grounds set forth in the preceding assignment of error, No. 25, which, for the sake of brevity, are not set forth here, but to which reference is hereby prayed.

SECOND

Appellants charge and allege that the U. S. Circuit Court of Appeals, in its Decision and Decree of Nov. 7, 1921, erred as follows, to-wit:

1.

In finding and deciding that the Public Notice of April 6, 1917 was given in clear accord with the statute; said Notice not having been given, as required by law, immediately upon the determination by the Secretary of the Interior that the Yuma Irrigation project was practicable, and immediately after he had let contracts for the construction of portions of the same, in August, 1905; and said Notice did not contain and promulgate the estimated cost per acre of the project, as determined by the Secretary in 1904; but contained and promulgated an excessive and arbitrary charge of $75 per acre, more than double the amount of the Estimated Cost.

2.

In finding and deciding that Appellant's point that that the system had not been finished—that "the proposed works had not been completed"—prior to the commencement of the suit, is of no real importance; for the reason that the pleadings, the uncontradicted evidence, and the official Reports of the Secretary of the Interior to Congress, in accordance with the provisions of the Reclamation Act, shows conclusively that "the proposed works", as described in the contract of commencement of this suit and were not completed at the time of the trial, and are not now completed.

3.

In not reversing the Decree of the U. S. District Court for the District of Arizona; and in not granting us the relief prayed for in Appellant's Bill of Complaint; in affirming the Judgment and Decree of the said District Court; for all the reasons set forth in the preceding Grounds of the First and Second Specifications of Error.

Wherefore, it is prayed the Judgments and Decrees of said Lower Court be reversed; and that they be directed to grant Appellants the relief prayed for in their Complaint; or that this Court enter such judgment herein as it shall deem meet and just.

THO'S. D. MOLLOY,
Counsel for Appellants.

## ARGUMENT

### INTRODUCTION

a. In this case, as pointed out in the 14th Paragraph of the Statement of the Case, supra, the principal questions involved are: What are the proper charges to be assessed against the lands involved, and whether or not the time had arrived on Dec. 1, 1917, or has yet arrived for the payment of the first installment of those charges.

b. In the Circuit Court of Appeals we assigned 26 Errors, which we conceived were committed by the Trial Court in the trial of the Case, expressed in the Opinion of the Trial Judge, and put into effect by the Decree. The Circuit Court of Appeals, if it erred, committed but one error, strictly speaking, which was in affirming the Decree and Judgment of the Trial Court. We have, however, here specified two errors; by the First it is charged that the Circuit Court erred in affirming the Judgment of the Trial Court, and we have alleged the 26 errors originally charged against the Trial Court as 26 separate grounds for the First Specification of Error charged against the Circuit Court. The Second Specification of Error calls attention, on less numerous grounds, to particular errors, in addition to those of the Trial Court, into which we believe the Circuit Court fell in expressing its opinion.

c. The principal Error charged, to the effect that the Trial Court erred in dismissing our Bill and refusing us relief, and that the Circuit Court erred in sustaining that dismissal, is set forth in the 25th and 26th Grounds of the First Specification of Error; and the principal Argument will be urged in support of those Grounds, but it will be principally by reference to the the arguments in support of the 17th, 18th, 19th, 20th, 21st, 22nd, 23rd and 24th Grounds of the First Specification of Error; and as set forth in Divisions XVII, XVIII, XIX, XX, XXI, XXII, XXIII, and XXIV of the

following Argument. However, all the grounds of Error will be argued, and none are waived.

d. In specifying the errors relied upon, we have adopted the plan of charging them in sequence as they occurred during the progress of the trial; and those errors are attacked by the first 13 Grounds of the First Specification of Error, and are supported by Divisions I to XIII of the Argument; the 14th to 24th, Grounds of the First Specification of Error, inclusive, attack the findings and expressed views of the Trial Court, as set forth in the Opinion of the Trial Judge; and we attempt to support those Grounds in Divisions XIV to XXIV of the following Argument. As before stated the 25th and 26th Grounds of the First Specification deal with the dismissal of our Bill and the refusal of the relief prayed for, and are support by Divisions XXV and XXVI of the Argument.

e. In the following Argument we attempt, and particularly desire, to stress and emphasize the following misapprehensions and errors of the Lower Courts:

1. In misconstruing the intention of Congress in the enactment of the Reclamation Act; and the Act itself; and in finding and deciding that any sum whatever in excess of the Estimated Cost can be charged against our lands, or returnel into the Reclamation Fund.

2. In finding and deciding that the Estimated Cost of the Yuma Project was not fixed and determined by the Secretary of the Interior in May, 1904, at less than $40 per acre; and in holding that the charge of $75 per

acre was lawfully charged against our lands by means of a Public Notice issued in April, 1917.

3. In misconstruing the force and effect of the Public Notices to be issued under Sec. 4 of the Reclamation Act; and that such a notice could have the effect, whenever issued, of determining the Estimated Cost of a PROJECT.

4. In misapplying the Decision in the Payette-Boise case, 263 Fed., 734; and in not following Judge Deitrich's opinion as to the meaning of Sec. 4 of the Reclamation Act, that the original Estimated Cost is to be returned, and not the actual cost.

5. In holding that this Court, in the Swigart-Baker case, 229 U. S., 187, decided that the Actual Cost, and not the Estimated Cost, of a Reclamation Project should be returned to the Fund.

6. In finding and deciding that the terms of the contract of May 31, 1906, had been complied with, and that "the proposed works" were completed; and that, therefore, the payments for the project, whatever they be, should have begun on Dec. 1, 1917.

(b) In the following Argument numerous references will be made to, and quotations taken from, the Annual Reports of the Secretary of the Interior to Congress as to the workings of the Reclamation Act, in accordance with Section 2 thereof. These reports and the pages thereof will be referred to in the following argument as follows: 4th Ann. Rep. R. S.. 75, as the case may be. They are officially designated as First, etc.,

Reports of the Reclamation Service, although made by the Secretary of the Interior.

(c) Those reports and other public documents are of great importance in this case, for the reason that by stipulation of the parties and Order of the Court (Rec. 203-8) they are deemed to be in evidence; and the parties may set forth in their respective briefs any portion of those public documents, with like force and effect as if they were incorporated in the Record. Quotations from them greatly lengthens this Argument, but the Transcript of the Record is shortened to that extent.

(d) It was urged below, and may be urged here, that the Trial Court was without jurisdiction, for the reason, as alleged in the Answer, that this is really a proceeding against the United States itself, which cannot be sued without its consent; but that contention was overruled, and properly so, under he authority of

Magruder vs. Belle Fourche, 219 Fed. 72,
Pars. 1, 2, 3 and 4 thereof,

and the authorities there cited.

## I.

## IMPROPER CROSS-EXAMINATION AS TO VALUES

In support of our 1st Ground of the First Specification of Error, we point out that, notwithstanding plaintiffs alleged in their Complaint in Sec. a Par. 23A thereof (Trans. of Rec. p. 24), that the lands involved could not

afford to pay the charge of $75 an acre, as assessed by the Public Notice of April 6, 1917, taken one year with another; and that said charge was excessive and exorbitant and out of all proportion to the actual value of the works constructed, plaintiffs did not, originaly, in the trial of the case proceed upon that theory, but rather upon the theory that the Secretary of the Interior having in May, 1904, determined the charges per acre to be borne by the lands in the Yuma Project to be less than $40, that charge was conclusive upon all concerned, whether or not it was an inequitable burden, or whether or not the works were worth it; and in our presentation of the case we refrained from offering any evidence in support of that allegation of the Complaint, until in the cross-examination of our principal witness Oscar P. Bondesson the defendants were permitted, over our objection (Trans. of Rec. pp. 290 to 296), to bring out matter tending to show the value of the lands within the project generally, and particularly the rental value of Mr. Bondesson's own land in the years 1916-17-18. This. we respectfully contend, was not proper cross-examination. We had not asked the witness anything about any time subsequent to the execution of the contract of May 31, 1906. That proposition, we believe, needs no citation of authority. It is true that the Trial Judge stated (Trans. of Rec. p. 294) that he heard the evidence for the purpose, among others, of determining what orders might thereafter be made in connection with an injunction pending a possible appeal; but it appears from the Judge's Opinion (Trans. of Rec. pp. 555 and 561) that it was heard for all purposes, and that very important findings of fact were based upon it; therefore the matter brought out in improper cross-examination was

prejudicial. Surely the value of lands within Yuma Project in the year 1917, and whether or not Mr. Bondesson was so fortunate as to be able to rent his particular pieces of land, adjoining the growing town of Somerton, as will be shown by the plats at pp. 40 and 228, Trans. of Rec., for $30, or any other sum, per acre, could not throw any light upon whether the Secretary of the Interior on May 10, 1904, properly advised from having before him the necessary maps, plans and estimates of cost, made the determination that the charges per acre on lands within Yuma Project should be less than $40 per acre; and did not in any way tend to answer the question as to whether or not "The Proposed Irrigation Works" were completed, as required by the contract of May 31, 1906; and whether or not said contract was ambiguous or unambiguous. Our theory of the case was certainly the theory later entertained by the Trial Judge as shown by his declaration from the bench at pp. 424, 468, 477 and 538 of Rec. It seems that, if the Trial Judge had entertained those views at the time of the objection to the cross-examination of the witness Bondesson, he should have sustained the objection.

## II.

## MORE IMPROPER CROSS-EXAMINATION

We urge in support of our 2nd Ground of the First Specification of Error that the error therein specified is of the same nature as that set forth in the 1st Ground. Improper cross-examination of the witness Bondesson (Trans. of Rec. 301-2), and the bringing out thereby, of the same kind of testimony. All that was said in the

preceding paragraph in support of the 1st Ground is hereby referred to and urged in support of this Specification of Error.

III.

## IMPROPER CROSS-EXAMINATION SHOULD BE STRICKEN

The 3rd Ground of our First Specification of Error is based on the refusal of the Trial Court to strike out the testimony incorporated in the 1st and 2nd Grounds of the First Specification of Error. Necessarily, if our contention urged in support of the 1st Ground (and they are here reurged) are sound, the 3rd Ground is well taken and should be sustained.

IV.

## PROFFER AS TO INDUCEMENTS SHOULD HAVE BEEN HEARD

Our 4th Ground of the First Specification of Error is based upon the following state of facts: During the progress of the trial plaintiffs offered and had heard oral evidence from the witnesses Bondesson, Ingraham et al., as to the circulation of the pamphlet, plaintiffs' Exhibit 15 (Trans. Rec. pp. 215 to 228): and as to certain statements made at the mass meeting of May 28, 1904, at Yuma, Arizona, by the Chief Engineer and the Supervising Engineer of the United States Geological Survey, and that all of the landowners within the Yuma Project believed in and relied upon such statements and representations, else they would not have mortgaged their homes to secure the payment of even the $35 per

acre that they were led to believe the project could be, and would be, built for (which in the final consideration of the case was admitted and carefully considered. R. 561); but during the progress of the trial, the Trial Judge announced that he would not consider the oral testimony as to what was said by the engineers (Rec. 476), or what was done on May 28, 1904 (Rec. 477), and there was an arrangement with court and counsel (Rec. p. 369), that, for the purpose of saving expense and the time of the Court that the offer set forth in our 4th Ground of the First Specification of Error might be made, refused, and exception deemed taken to the ruling. Evidently the Trial Court did not, as we view it, give due weight to the force and effect of all that our witnesses testified to, or what our prospective witnesses would have testified to, else the Court would not have found (Rec. p. 561) that the landowners ONLY BELIEVED that the estimate of the probable cost of the project was ample. Our proof, and proffered proof, was to the effect that the landowners were induced, by the pmaphlet and the representations ,to enter into a definite, fixed contract at a specified sum, the payment of which they mortgaged their homes to secure. We contend that the proffered proof (Trans. of Rec. 369) should have been heard, and that it was error to refuse to hear it. The only theory on which it could have been properly rejected, was that it was merely cumulative. The testimonies of our witnesses Bondesson, Cloyd, Donovan, Greer, Ingraham and Lyon, being sufficient on those points—but the proffer was not refused on that ground (Rec. 504-5).

(Division V)

## PROFFER AS TO EXCESSIVE CHARGE AND VALUE WORKS SHOULD HAVE BEEN HEARD.

In support of our 5th Ground of the First Specification of Error, we point out that, while, as before stated, the plaintiffs had refrained from offering any evidence in support of their allegations (Trans. of Rec. p. 24) that the charges of $75 per acre were excessive and inequitable, and that the lands could not stand them, one year with another, when the Trial Court permitted the defendants, over our objections, to draw from the witness Bondesson, in cross-examination, some facts tending to show that the charges were not excessive, and that the lands could equitably bear the charges, then we insist that it became imperatively necessary, in the interests of justice and a fair trial, that the plaintiffs be permitted to introduce the proffered evidence set forth in the 5th Ground of the First Specification of Error (Trans. of Rec. p. 371). Upon our theory of the case, as originally acted upon, and later entertained by the Trial Judge (R. 424, 468, 477, 538); and if the Bondesson testimony brought out on improper cross-examination, as shown in the 1st and 2nd Divisions hereof, had been ignored that error would have been harmless, as would have been the rejection of this proffered evidence: but when we find the Trial Judge finding as facts—"when we take into consideration the results accomplished and the increase in the value of the lands under the project * * * it would seem that such expenditures were amply justified (Trans. Rec. p. 555); and "it may be said that while the cost of the construction was much greater than was anticipated, the lands have been

greatly benefitted, and the testimony shows that the annual net revenue per acre is almost equivalent to the cost per acre of the project" (R. 561) it can be seen how highly prejudicial the rejection of that proffered testimony was.

## VI.

## PROOF AS TO HOMESTEADERS.

After the plaintiffs were permitted to amend their complaint (Trans. of Rec. p. 142), as shown at pp. 57 to 61 Trans. of Rec., the corporate plaintiffs being thereby permitted to sue on behalf of that class of its constituent members who were homesteaders, and whose entries are threatened with reduction in area to the limit of one farm unit, it seems as if the proffered testimony as set forth in the 6th Ground of the First Specification of Error (Rec. 372) should have been received. We believe that the appellees, through their counsel, are willing to admit all the allegations as shown in the second paragraph of the amendment, pp. 58 to 60, Trans. of Rec., but unless such admissions are somewhere made of record, it clearly appears to us that it was error to reject the proffered proof. It may be that in law those facts, even if admitted, would not entitle that particular class of landowners to the relief prayed for as to them; but there was no objection on that ground, and only the general objection, without any assigned reason, that the proffered evidence, was incompetent, irrelevant and immaterial (Rec. 373) which it certainly was not after the Complaint had been amended, as pointed out.

(Division VII.)

## PROOF AS TO COST SHOULD HAVE BEEN REJECTED.

In support of our 7th Ground of the First Specification of Error, we urge that the testimony of Director Davis therein incorporated (Rec. foot of 379 to 384) should not have been admitted over our objections. In the first place the answers were not responsive to the questions, as what was inquired about (Rec. 380) was the difference of opinion between the witness and the other five members of the Board of Consulting Engineers which met at Yuma, Arizona, and formulated and made the report under that date, plaintiffs' Exhibit 16 (Rec. 235, see also Rec. 409); and, in any event, the testimony was not relevant or material on plaintiffs' theory of the case adopted by them, and as the case was actually tried under the ruling of the Trial Court as shown; and certainly not relevant or material on the theory of the case adopted by the Trial Court (Rec. 424, 68 and 77 and 580); for, certainly, whether or not Mr. Davis disagreed with his associates, or whether or not certain items of cost increased, could not aid the Court in determining whether or not the Secretary of the Interior had, on May 10, 1904, fixed the estimated cost of the project according to law; or in determining whether or not the project was finished as provided for by the contract of May 16, 1906. This testimony also tended to show the actual cost of the project which the Court later refused to hear about; and we deem it inequitable and wrong for the defendants, thirteen years after the Secretary of the Interior had formally and officially declared the cost of the project, and his official represent-

atives had given assurances that the project could be, and would be, constructed for $35.00 per acre, and the landowners believing in, and relying upon, those assurances (see testimonies of Bondesson, pages 261 to 269, and page 275; Ingraham, pages 324 to 333; Cloyd, 344; Donovan, 348; Greer, 352; and Lyon, 336, Trans. Rec.) had mortgaged their homes to secure that originally estimated cost, to be permitted to introduce that portion of Mr. Davis' testimony for the purpose of establishing a charge of more than double the amount that the landowners believed they were contracting for.

## VIII.

## DIRECTOR DAVIS' IMPEACHMENT OF THE DETERMINATION OF THE SECRETARY

In support of our 8th Ground of the First Specification of Error, as to the admission of Mr. Davis, testimony therein incorporated (Rec. 385 to 392), we deem the reasons and grounds set forth in the Specification itself, as support thereof, and we urge the same that such testimony is irrelevant and immaterial as the examination and surveys of the Yuma Project had been duly made under the provisions of the Reclamation Act of June 17, 1902, as conclusively shown by the evidence in this case, in the years 1902, 1903 and 1904, and prior to May 10, 1904, by the Secretary of the Interior for the purpose of locating and constructing said Yuma Propect, and that upon such examinations and surveys the Secretary of the Interior had, on May 10, 1904, determined the feasibility and practicability of said

(Division VIII.)

Yuma Project and all thereof including the North and South Gila Valleys described in plaintiffs' complaint as Tracts A and B, respectively; and did thereafter July let contracts for the construction thereof; and any opinion of the witness Davis in 1919 as to whether or not said project was then, or on April 6, 1917, feasible and practical is irrelevant and immaterial and an attempt to impeach and impair an official and judicial determination of his superior officer, the Secretary of the Interior, made in 1904, when such officer had jurisdiction to so determine and estimate. And upon the further ground that it is irrelevant and immaterial what was the significance of the acquisition (if there was an acquisition) of the Lower Colorado Irrigation District, for the reason that all such questions and negotiations were merged in the written contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7; and said testimony of said witnesses was an attempt to vary the terms of said written instrument by parole. And for further reasons that all the surveys and plans referred to in said testimony had been reduced to writing, and the plans and surveys themselves were the best evidence; to which ruling of the Court in overruling plaintiffs' objections to the introduction of said testimony and in admitting its introduction, the plaintiffs duly excepted at the time, and if any significance should be attached to Mr. Davis' answer to the question of the Court at page 388 Record, to the effect that he, Director Davis, had determined the Gila portions of the project not to be feasible, we respectfully suggest that Mr.

Davis was not the proper officer to make such determinations, but his superior officer, the Secretary of the Interior.

## IX.

## HEARSAY TESTIMONY OF MR. DAVIS.

Our 9th ground of the First Specification of Error may very well be waived, but the testimony therein (Rec. 401-2) does not seem to have been closely enough connected with any party to this suit to render it proof against the urged objection of it being hearsay. We believe and urge that it should have been rejected.

## X.

## DIRECTOR DAVIS' DIP INTO THE FUTURE.

We also urge that the testimony incorporated in our 10th ground of the First Specification of Error (pages 404 to 407, Rec.) should also have been rejected for the reason and upon the grounds set up in the specification itself, which are herein renewed: It was irrevelant and immaterial and too speculative, it not tending to prove or disprove whether or not the proposed works of the Yuma Project as set forth and described in the contract of May 31, 1906, annexed to plaintiff's complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed or uncompleted at the time of the institution of this suit, or at the time of the trial; what will happen in the future or subsequent to the trial herein could not tend to throw any light upon what had happened on April 6, 1917, the date of the so-called public notice involved in this suit.

(Divisions XI, XII and XIII.)

## XI.

## MR. LIPPINCOTT'S TESTIMONY

We think it quite clear that the testimony of the witness Lippincott, incorporated in our 11th ground of the First Specification of Error (Rec. 489-90) was susceptible to the objections urged; as it was not responsive, and did not come within the scope of the cross-examination, and did not tend to prove or disprove whether or not the project was completed. Clearly because Mr. Lippencott in one drive thru the valley saw some evidences of some prosperity did not tend to prove that the project was completed as requred by the contract; any more than proof that one farmer was lucky enough to have rented one piece of land adjacent to a town for $30.00 per acre, for three years, proved that all the land in the project was able to bear a charge of $75.00 per acre.

## XII.

## SHOULD HAVE BEEN STRICKEN.

If it was error to admit testimony of Mr. Lippincott, as set forth in Specifications, of Error eleven, of course our twelfth ground of the First Specification of Error should be sustained, as it was error not to strike the testimony on our motion. (Rec. 490.)

## XIII.

## THE PLEA OF EPUITABLE SET-OFF.

In support of our 13th ground of the First Specification of Error we urge the following:

a. The defendants, over the objections of the plain-

tiffs (Rec. 393), had been permitted to introduce in evidence their Exhibits Nos. 3 and 4 (Rec. 396 to 400), on the theory, we presume, that these official documents tended to prove that the Secretary of the Interior had officially determined the Gila portions of the project to be no longer feasible; and Director Davis had been permitted to testify, over our objections, as heretofore set forth, that those portions of the project were no longer feasible, and that HE had DETERMINED that it was impracticable to irrigate them (Rec. 596); those documents being both dated long subsequent to the institution of this suit, and evidently being the result of second thought, and, if we were opposed to a private litigant we would have no hesitation in asserting that they were executed in bad faith for the purpose of affecting the result of the law suit. As to WHEN Director Davis, judicially or otherwise, determined that the Gila portions of the project were no longer feasible, is not clear from his testimony; but such determination upon the part of Mr. Davis must have been recently arrived at, for, as we will later show in support of our 24th ground of the First Specification of Error, Mr. Davis had recently, through the Secretary of the Interior, reported otherwise to Congress. Under all the circumstances we should have been permitted, on our petition, (Rec. 136), to plead and prove the facts alleged in the first paragraph of the proffered supplemental pleading (Rec. 138). The circumstances we are so unusual it is difficult, if not impossible, to find apt authority in point, and we are unable to cite any; but submit the

question to the sound judicial discretion and equitable conscience of this Court.

b. As shown from the cross-examination of Director Davis (Rec. 446), without objection, Imperial Irrigation District, the municipal corporation which manages and distributes the water supply to the great Imperial Valley in California, in the year 1918, long subsequent to the institution of this suit, entered into a contract to pay the United States $1,600,000.00 for the use of the Laguna Dam, the most important and costly portion of the Yuma Project, but that the plaintiffs in this case are not, in Mr. Davis' opinion, to receive any credit or benefit because of that contract or the future payments thereunder, as shown at pages 446-7-8 of the Record. Under Equity Rule 46 the plaintiffs were permitted to introduce the evidence of Mulford Winsor (Rec. 537 to 541) tending to show that the Secretary of the Interior Lane had made some promises that the plaintiffs were to receive some credit and benefits from the Imperial Irrigation contract and the $1,600,000.00 to be paid thereunder. Under these extraordinary circumstances we contend that we should have been permitted to plead and prove the facts alleged in the second paragraph of the proffered supplementary pleading (Rec. 139-40), on our petition to that effect (Rec. 136). If, as finally held by the Trial Court, we are compelled to pay the actual cost of the project at $75.00 per acre, notwithstanding the official declaration of the Secretary of the Interior on May 10, 1904, that the cost, would be less than $40 per acre (Rec. 202), and the promises of the engineers that it would not exceed $35.00 per acre, and

the government is to have paid to it $1,600,000 for the use of a dam that have paid for, and that in justice and equity should belong to us, it would seem that in natural justice and in common sense, we ought to get credit for the $1,600,000, as it is paid; and that NOW is the time to settle that question. If the law is so harsh, surely, we ought to be entitled to the equitable set-off, at least, to plead and attempt to prove it.

c. When we use the term "equitable set off" we fully appreciate that it is neither apt nor appropriate; and is only used for the want of a better term. Yet in a sense this may be said to be a case where the defendants are setting up the right to compel us to pay to them $75 per acre for certain services, we contending that we should pay but $40 at the outside. Therefore we believe that any facts that would tend, equitably, to defeat the claim of the defendants, should be permitted to be pleaded. Supplemental pleadings belong primarily to equity practice:

31 Cyc. 499 D.

We believe that the Trial Court was in error when it ruled (Rec. 542) that the plaintiffs could not file a supplemental pleading, for the reason as stated, that they knew all of the facts set forth in the proffered supplemental pleading for some time prior to the commencement of the trial, and TRIED THE CASE ON AN ENTIRELY DIFFERENT THEORY. As we understand the law of pleading dealing with supplemental pleadings, they are permitted either where the facts have arisen since the commencement of the original suit, or

the facts while arising prior to the commencement of the suit, they had not come to the pleader in time to make an amendment:

21 C. J. 540 Sec. 658,

and the facts which occurred after the filing of the original bill cannot be incorporated therein by amendment, but a supplemental bill is the proper and necessary proceeding:

21 C. J. 542 Sec. 659.

(d) It is true, as has been pointed out by the Court, (Rec. 543) that we did try the case on an entirely different theory. That theory was also adopted by the Trial Court (Rec. 424, 468, 477); but nevertheless the defendants were permitted, over our objections, to introduce in evidence the purported orders of the secretary, defendants' Exhibits 3 and 4 (Rec. 496-8); and the peculiar and unprecedented facts concerning the contract with Imperial Irrigation District had been got into the Record without objection; and we feel that the Lower Court had in many ways departed from its and our theory of the case; and we urge that in justice and equity the supplmental pleadings should have been permitted.

(e) We do not wish to be misunderstood in this matter: We are still willing to adhere to our original theory: that on May 10, 1904, the Secretary of the Interior fixed the charges per acre of the Yuma Project at less than $40 (under all the circumstances we are

willing to concede, for convenience—that means $40 per acre, which we are willing to pay). That was equally binding upon the landowners and the government; and that even, if by some chance, the project had cost considerably less than $40 per acre, or, rather, considerably less than $3,000,000, which we shall later show, was the REAL estimated cost of the project, the landowners would have been obliged to pay that estimated sum; and we having paid, or having begun to pay, the estimated cost, as required by law, and the government should, by any chance, be able to reap any benefits from the rent of the use of the Laguna Dam of the Yuma Project, such use not being inconsistent with a proper and sufficient flow of water to the lands of the Yuma Project, it would be none of our concern; for Sec. 6 of the Reclamation Act provides that upon the payments being made the management and operation of the IRRIGATION WORKS should pass to the landowners, but the TITLE and OPERATION of the reservoirs and the works necessary for their protection, etc., should remain in the government. For the purpose of maintaining that view, it could very well be urged that the Laguna Dam creates a reservoir above it, and that it is a necessary work for the operation of that reservoir; and that therefore the title to, and the operation of, the Laguna Dam should remain in the government until otherwise provided by Congress; and therefore the government would be entitled to collect rent for its use from other water users than the plaintiffs in this case. In that view of the case we are in no way concerned in the contract between the United States and Imperial

Irrigation District, or the payments to be made thereunder. But when, as we view it, natural justice and equity and common sense being flouted; and it is judicially determined that we must pay the ACTUAL and COMPUTED cost of the entire project, or such portion thereof as the Secretary of the Interior shall arbitrarily determine we shall pay and then after that arbitrary determination has been made; and we are required to pay more than double the amount that we originally believed we would have to pay when we mortgaged our lands to secure its payment, we believe that a Court of Equity should inquire into all the facts; and if after the determination was made some time prior to April 6, 1917, the government should from an outside source receive the sum of $1,600,000 which had been assessed against our lands, there should be at least a NEW INQUIRY and a NEW DETERMINATION by the Secretary of the Interior and we should get some credit for the payment of $1,600,000.

(f) It is true that on that contention we may be met with the response that Director Davis, as shown by his testimony, as a SEER of wonderfully prophetic vision, and that he well knew as early as 1916 at least, when the estimate of $75 per acre must have been made, that in the year 1918, after this law suit had been begun the Imperial Irrigation District would enter into just such a contract as they did finally enter into, and that he, in advance, gave the Yuma Project due and full credit for this $1,600,000 in the estimating of the cost of $75 per acre. But the answer to that is, that Mr. Davis is not the person or the officer to make those estimates

and to give those credits; but his superior officer the Secretary of the Interior; and that the law does not permit public officials, in dealing with private individuals' rights and property, to be SEERS or PROPHETS, for they should follow the letter of the law.

(g) The whole matter is so peculiar and unprecedented that we believe it would be hopeless to even attempt to search for authorities in point; and therefore we are compelled to submit this question to the sound discretion and equitable conscience of the Appellate Court.

## XIV.

## IMMATERIAL WHAT THE PROJECT ACTULLY COST.

In support of our 14th ground of the First Specification of Error as to the finding of the Trial Court (Rec. 555) that the Yuma Project has cost greatly in excess of the estimate of the engineers being irrelevant and immaterial, we respectfully urge that if our position taken in the arguments in support of our 19th, 20th and 21st ground of the First Specifications of Error, infra, is sound, it necessarily follows that this Specification of Error is well taken. The finding was based, of course, on the objected-to evidence of Director Davis, which is the subject matter of our 7th ground of the First Specification of Error and the arguments in support of that ground, as well as the other three mentioned, are hereby referred to and urged in support of this specification.

(Division XV.)

THE FINDING AS TO ACTUAL NET REVENUE

a. In our 15th ground of the First Specification of Error we attack the finding of the Trial Court (Rec. 561), that the annual net revenue per acre of the lands within the Yuma Project is almost equivalent to the construction cost per acre of the project. Taken altogether we believe that that is one the most astounding findings of fact ever made by a Trial Court. It is wholly unsupported by the evidence; and the only thing in the Record to even remotely sustain it is the evidence of Oscar P. Bondesson, brought out on improper cross-examination, as we contend, and which is the subject of our 1st, 2nd and 3rd grounds of the First Specifications of Error; and which are argued in the 1st, 2nd and 3rd Divisions of this Argument, where Mr. Bondesson showed that he had rented his lands, which are located adjacent to the town of Somerton (see plat p. 9 hereof), for the sum of $30 per acre per year for a term of three years.

b. Surely there must have been something in the air at the time of the rendering of the decision in this case by the Trial Court to induce, or to hypnotize, such a careful, painstaking, conscientious and learned jurist as Judge Sawtelle to make such a finding of fact. At the time of the trial of the case, and during the time it was under consideration, and at the time of the rendering of the decision, February 26, 1920, we were in the midst of a stupendous farm-products boom in the Yuma Project. Cotton was bringing as high as 51c per pound. Rental values, for the moment, and on paper, had gone even higher than $30 per acre. Some choice tracts of

land had sold as high as $400 per acre; but that was but for one year, and it did not give back to Oscar P. Bondesson, Robert H. Theilmann, Andrew Y. Greer and numerous other early settlers on lands within the Yuma Project, the twenty best years of their lives that they wasted waiting for just such prices; and even if those values had been maintained up to the present hour, which they have not, the average products of the land, one year with another from 1904 to the present time, would not justify a charge of $75 per acre; and as we offered to prove (Rec. 371), the works are not actually worth the sum of $75 per acre. If this case had been tried in the spring of 1921, instead of the spring of 1919, with cotton selling in Yuma Valley at between 8 cents and 10 cents a pound as it was, and not much selling even at that price, and lands having no sale value, and but little rental value, it might very well be, that there would be a different atmosphere altogether and no finding of fact would be made to the effect that the annual net revenue per acre of the land is almost equal to the cost per acre of the project.

c. We feel that finding is peculiarly harsh and prejudicial in view of our offer (Rec. 371) to prove a diametrically opposite state of facts, and Mr. Bondesson's testimony (Rec. 301) that his land cost him more than he will ever get for it in time and labor; and the statement of plaintiffs' counsel, in support of their motion to strike it with other like testimony of Mr. Bondesson (Rec. 312): "if that sort of testimony is to stand, it compels us to open this sort of a field, that those are the fat years in the history of this project.

Then we will have to go into the lean years. In the nature of things we would have to bring what might be called a counter-claim against the Reclamation Service for the damage that is almost inevitable by not finishing the project." We feel that the Trial Judge, no doubt unconsciously, was influenced in rendering the decision in this case by the testimony of Mr. Bondesson brought out in improper cross-examination; and even at that wholly inadequate to establish the rental or other values of the lands within the project, as a whole.

## XVI.

## THE HOMESTEADERS

In our 16th Ground of the First Specification of Error we challenge the inaction of the Trial Court in not passing upon or deciding the question raised by the amendment to our complaint permitted to be made on the first morning of the trial (Rec. 142 and 57 to 60); and the denial of the relief prayed for in the complaint as amended, for the class of homesteaders described in the amendment.

a. We have already, in support of our 6th Ground of the First Specification of Error presented some of the facts concerning this class of homesteaders. But to be more specific we will take the tract of land entered by Charles Theobald in 1901, prior to the passage of the Reclamation Act, and his successor in interest Wm. A. Hevener, as set forth in the amendment (Rec. 58), in 1904 when the Yuma project was authorized. The Theobald land, while not patented, was in what is known as private ownership. Thereafter in 1908 Theo-

bald relinquished for the use and benefit of Hevener, who immediately entered the land, paid the land office fees and commissions and has ever since down to the present time held full 160 acres of land. This case is typical of 6,000 acres of land in Tract "C."

b. As we shall later attempt to show in support of our 22nd Ground of the First Specification of Error, dealing with the Public Notice, not later than June, 1905, when contracts were let for the Laguna Dam and twelve miles of work on the levees:

4 Ann. Rep. R. S. 98 and 100.

It became the duty of the Secretary of the Interior to give public notice of the limit of area per entry of lands within the Yuma Project:

Sec. 4 Reclamation Act.

But so far as is disclosed in this case the Secretary does not seem to have given any public notice of the limit of area per entry within the Yuma Project until April 6, 1917. At the trial of this case on May 1, 1919, Hevener was still holding his 160 acres of land. He is still holding it owing to certain war legislation and rulings of the Secretary of the Interior.

c. We contend that in the face of those facts, the Secretary permitting Mr. Hevener and numerous other homesteaders similarly situated, to hold their full acreage for some ten years, without any attempt, so far as is disclosed by the testimony in this case, to give a Public Notice or to in any way limit the area of the

entries; the Secretary must be deemed, in equity, to have established the limit of area per entry in the Yuma Project at the full acreage held by the various entrymen; and that he should be estopped in 1917 to say that he did not in 1905 perform his duty as to the giving of the Public Notice limiting the area of entries.

d. We appreciate the fact that a great deal can be said in support of the contention that the Secretary has even now a right to limit the area of those entries. It is true that the Act is explicit that entries made thereunder are subject to all the limitations thereof; and there is a long line of adjudications by the Secretary on the point, which have never been attacked in the courts or otherwise disturbed. But those adjudications were in cases where there was a reasonably prompt attempt made by the Secretary to limit the area of the entries; and not a single case has been brought to the attention of the Land Department, or the courts, where the Secretary had permitted the entrymen to hold all the land embraced in his entry for the period of nine or ten years without any attempt having been made to reduce the entry to a farm unit.

e. Another point is that nowhere does there seem to be any provision to repay to the entryman the fees and commissions paid by him for the entry of the land. Altogether, we believe that the most logical and equitable conclusion to come to in this case is, that it should be assumed as an established fact that the Secretary did, by his continued silence and inaction from June, 1905, until April 6, 1917, actually establish the limit per acre of entries in the Yuma Project at 160 acres, or whatever

less acreage a particular entryman may have succeeded in securing a homestead entry upon.

f. But we have even a more serious attack to make upon the limit of 40 acres sought to be imposed upon the homesteaders in this case; and in this connection we invoke the doctrine of functus officio. Sometime prior to December 5, 1910, more than six years prior to the issuance of the Public Notice in this case, the Secretary of the Interior fixed and established the farm unit areas within the Yuma Project at 80 acres, which is the same thing as limiting the area of the entry. See

9th Ann. Rep. R. S. 73,

"Limit of area of farm units: Public, 80 acres, private, 160 acres."

We now contend, as we shall later and more exhaustively contend in support of our 21st Ground of the First Specification of Error, in the 4th subdivision of the argument in support thereof, that if the Secretary had not, by his long silence from 1905 until 1912, in equitable contemplation actually established the limit per acre at 160 acres per entry, he did, on December 5, 1910, or sometime prior thereto, by making his report to Congress, supra, fix a limit per acre per entry within the Yuma Project, and that thereby his authority to further limit the area became exhausted and ended:

20 Cyc. 858, Note 12—and the authorities there cited.

g. Therefore, we respectfully contend that the homesteaders herein sued for by the corporate plaintiff are

entitled to the relief prayed for, at least to the extent of having their holdings not reduced below 80-acre farm units.

## XVII.

## THE PAYETTE-BOISE CASE.

In our 17th Ground of the First Specification of Error we challenge as erroneous that part of the decision of the Trial Court (Rec. 556) which cites as supporting authority the Payette-Boise Case, 263 Fed. 734.

a. The facts in the two cases are not even remotely alike. The Lower Court here could have very well indeed cited Paragraph numbered (1) on page 738 of 263rd Fed. Rep., set forth below in support of our 20th Ground of the First Specification of Error, Par. f, Subdivision 4, page 123, infra, as authority for finding for us and granting the relief prayed for in the complaint. We deem the leaving out of that paragraph in that portion of the Payette-Boise decision quoted in the Opinion (Rec. 556-9) as being comparable to an attempt to present the play of Hamlet without having anyone take the part of the son of the deceased King of Denmark.

b. Our evidence, documental and oral, is absolutely uncontradicted, that everyone in this case, including the engineers, believed in good faith that the Yuma Project COULD be, and WOULD be, constructed, as a whole, for the charge of not to EXCEED $40 per acre, at the extreme outside—the gross sum of $3,000,000:

See page 498 Rec. for the Supervising Engineer's avowal of good faith;

(Division XVII, Par. b.)

See page 225 for the Chief Engineer's avowal that an effort had been made to COVER ALL CONTINGENCIES, and that the ESTIMATE OF COST were liberal;

See page 226 Rec. for the official statement and determination of the Secretary of the Interior, where he positively stated that "IT APPEARS" the Yuma Project * * * can be reclaimed at a cost of less than $40 per acre.

See pages 238-9 Rec. for the statements of the members of the Board of Consulting Engineers.
And the testimonies of our witnesses:—Rec.

BONDESSON—265-267 as to the Chief Engineer and Supervising Engineer, and
275 as to his reliance thereon;

INGRAHAM—324 Rec. as to the Board of Consulting Engineers;
328-331 as to the Chief Engineer and Supervising Engineer, and
333 as to what he himself believed in and relied upon;

LYON—338-9 as to the Consulting Engineers, and
340-342 as to the Chief and Supervising Engineers;
342 as to what he himself believed in and relied upon;

CLOYD—340-346 as to the statements of the Chief and Supervising Engineers;
347 as to what he himself believed in and relied upon;

(Division XVII, Pars. b and c.)

GREER—353-4 as to the statements of the Chief and Supervising Engineer, and

354 as to what he himself believed in and relied upon.

All to the effect that they BELIEVED and relied upon the statements set forth in the PAMPHLET and the REPRESENTATIONS of the ENGINEERS that the project COULD BE, and WOULD BE, constructed for the ESTIMATED COST, and within TWO YEARS from the actual commencement of the work; and that if they had not believed in and relied upon those statements and representations they WOULD NOT have PLEDGED THEIR LAND to secure the COST of the project. And later events proved that everyone concerned had good reason to believe in and rely upon the estimates:—The contract for Laguna Dam was let for 87 per cent of the estimated cost (4th Ann. Rep. R. S. 99), and when one-half of the work was done, but little more than one-half the allotment was spent. See Pltffs' Ex. 34 (Rec. 544).

c. A very different state of facts was presented to JUDGE DIETRICH in the Payette-Boise case, as found in his decision as quoted in Rec. 556-9:

"The evidence wholly fails to establish the claim that the statements and acts of the government officials were INTENDED or UNDERSTOOD to be final or binding upon the government. By an overwhelming preponderance of the circumstantial, as well as the direct evidence, I am convinced that it was generally understood that the settlers would be required to pay the ACTUAL COST, whatever that might turn out to

be (Rec. top of page 557); the Arrowrock Dam was not thought of until long after the project was undertaken, and, of course, its cost in no wise entered into the computation upon which the earliest estimates were based. It is inconceivable that the construction of this new feature which was to add so much to the efficiency of the service would have been urged by the farmers or undertaken by the Reclamation Service at an estimated cost approximately equal to that of the rest of the system but for the assumption that those for whose benefit the work was to be done would make a reimbursement for the outlay (Rec. 557-8) * * * From all the evidence I find that the understanding was that the provision of the Act requiring the estimate to be made before commencing construction work and before settlement, would be waived and that the settlers would pay the ACTUAL COST when and after that should be determined, instead of the ESTIMATED COST to be determined by the Secretary in advance" (Rec. 558).

While it is true that frequently during the trial of the case Chief Counsel King orally urged to the Court that the plaintiffs were estopped, the word "estoppel" or the word "waiver" does not once appear in defendants' Answer; nor is there a single fact pleaded tending to show "estoppel" or waiver," nor is there a single fact proved tending to show estoppel or waiver. Therefore we contend that the citation of the Payette-Boise case, and the quotation therefrom by the Lower Court, was inept and erroneous. If, in this case, the Laguna Dam had not been included in the original plan of the Yuma Project, and thereafter we had besought the Secretary of the Interior to construct it for us, upon promises, expressed and implied, that we

should pay for its construction, at a cost of $2,000,000 or more, THEN we should say that in equity and justice we should pay for it; and we could not enjoin the defendants from shutting off our water because we refused to commence making such just payment.

## XVIII.

## THE SWIGART-BAKER CASE.

In our 18th Ground of the First Specification of Error we approach the very citadel of the appellees in this case—the Swigart-Baker case, 229 U. S. 187. It was contended below, and will be contended here, that the decision of this Court in that case forecloses our contention in this case; and that this Court explicitly and positively decided that the Reclamation Act SAYS and MEANS that the ACTUAL, and not the ESTIMATED, cost of construction be returned to the Reclamation Fund.

a. It is our contention that, if there was anything at all said in that case that could possibly affect this case, it was obiter dicta. In some of our arguments it may seem as if we are unwarrantably assuming that this Court knows no law; and it may very well be that some of our efforts to enlighten the Court may but tend to befog what has always been clear, and to render uncertain the certain; but in that we shall trust to the learning and sound common sense of this Court. Therefore we do not deem it necessary or wise to cite to this Court a long list of authorities that could easily be compiled dealing with obiter-dicta opinions.

(Division XVIII, Pars. a and b.)

We feel that the following, which we offer, in compliance with the rules, will neither be inept nor burdensome:

"Obiter dicta are opinion not called for by the case."

United States ex rel. Johnson vs. County Court, 96 U. S. 211.

"The opinion of a court cannot be relied upon as a binding authority, unless the case be called for its expression."

Re City Bank of New Orleans, 3 How. 292,

"Where a point has not been contested in a former decision, the court is not bound by views expressed thereon."

Cross vs. Burke, 146 U. S. 82,

"An expression of opinion upon a point not decided by the Court is a mere dictum, lacking the fore of a judicial determination."

McCormick vs. Aultman Co., 169 U. S. 606.

"An opinion given in a decision cannot be relied upon as binding authority unless the case called for its expression."

Bardes vs. First Nat. Bank, 178 U. S. 524.

b. We confidently assert the Swigart-Baker case, on the question of cost does not affect this case; that the main question there decided is not for decision here; and that anything said in that case on the question of cost does not rise even to dictum as far as this case is concerned. It simply decides that, by a fair construction of the Reclamation Act, as a whole, that the cost of

operating and maintaining a Reclamation project may be collected from off the land served, in addition to the estimated cost of construction of the project. The word "estimated" was not before the court in that csae for interpretation, and it was not interpreted. Apparently neither of Sections 2, 3 and 4 which are positively before this Court for construction, was before the Supreme Court for construction in that case, for neither of those three sections are quoted at length, while Sections 5, 6 and 10 are set forth in full in the margin of the decision (see p. 1146 Law. Ed. and p. 195 Official Report). It might be plausibly contended that Sec. 4 was not before the Supreme Court for clearly the learned Justice who wrote the opinion did not in that decision correctly quote from Sec. 4. Five times (pages 193, 194 and 197 Off. Rep., and pages 1146 and 1147 Law. Ed.) did he misquote Sec. 4, if he meant to quote it at all. Three times he probably intended to quote it (pages 193 and 197 Off. Rep.), for he places quotation marks around "cost of construction of the project," omitting the word "estimated" each time. That, at least is conclusive of one thing—that the judicial determination of the meaning of the term "estimated cost" is yet to be made by this Court. It may be also be worthy of note that in another case relied upon by defendants, U. S. vs. Cantrall, 176 Fed. 949, the learned Judge misquoted Sec. 4 by substituting the word "entire" in lieu of "estimated" cost, reading at page 953.

c. We are not unmindful of the stress laid by the this Court upon the Reclamation Fund being a revolving fund; but we suggest that it is no fault of ours

that the fund has not revolved at least one and one-third times. The trustees of the fund have been negligent—the faultless and helpless beneficiaries should not suffer. Surely, indeed, the Reclamation Fund was intended to be a revolving fund, and that all of the moneys expended, except possibly some half million per year for surveys on impracticable projects (House Doc. No. 1468, p. 14), should be returned from the lands benefitted. It has not been a revolving fund:—it is painfully apparent that it has been anything but that. But if the moneys expended have not been returned—tens of millions never will, and never can, be returned—whose fault has it been—the water users, or the agents of the government? In every instance and in every way the fault of the agents of the government. Either in lack of the most ordinary professional precautions and business foresight in undertaking projects which, if the actual cost thereof as now computed, is the fair, reasonable value, could not be constructed for three, and in some cases, four or five, times the estimated cost, or because of the adoption of the wasteful and time-killing "force account" system. A complete, intelligent, logical and workable plan was devised by the Reclamation Act to keep the fund revolving and to insure the return of all the moneys expended, and had the law, in its letter and spirit, been enforced, and the plan adhered to, the intent of the law would have been fulfilled, and the hopes of its adherents would have fructified.

d. We assert that the abandonment of the contract system, so strongly emphasized by Senator Hansbrough, Vol. 35 Cong. Rec. 1384, infra, page 98, was the cause

of all the woe, waste and waiting under the Reclamation Act, and of the fund not revolving. The contract system was strongly recommended in:

3rd Ann. Rep. R. S. 45,

as follows:

> "Most of the construction work CAN BEST BE DONE BY CONTRACT * * * Work under the so called 'Force Account' is performed on minor construction when it is impracticable to give in advance an accurate description or estimate of conditions to be encountered."

The wisdom of the contract system cannot be better exemplified than by pointing out that the estimated cost of the Laguna Dam was $918,821 (Rec. 189), and the contract was let for that work to J. G. White & Co. for the sum of $798,650, 87 per cent of the estimated cost, that bid being the lowest of nine, all of which, except one, being below the estimated cost; the highest bid of the eight below the estimate being $52,261 below it:

4th Ann. Rep. R. S. 99.

e. Another practical exemplification that Congress had devised a logical and workable scheme in providing that the ESTIMATED COST, ONLY, should be returned to the Reclamation Fund, is that, even after the contractor of the Laguna Dam was permitted to throw up its contract in the spring of 1907 (notwithstanding its bond for $160,000 to complete the work Rec. 95, Defts. Ans.)

6th Ann. Rep. R. S. 75,

and there had been six months of "Force Account," it is shown by plaintiffs' "Exhibit 34" (Rec. 544), the Secretary of the Interior, on September 25, 1907, declared over his official signature, that substantially one-half of the work on the Yuma Project had been completed, and that but little over one-half of the money set aside for its construction ($3,000,000) had been expended.

f. And we may very well, indeed, rely upon the Swigart-Baker case for support for our contentions here. In Par. 2 of the decision it refers to congressional construction placed upon the Act; and at page 198 of the official report speaks of the annual reports made by the Secretary to Congress (which we strongly rely upon) and that no adverse action was taken upon certain assessments mentioned in the reports as to O. and M. charges. We point out the express statements of the Secretary as to the advantages and meaning of the provisions of Sec. 4 concerning the returning of the estimated cost to the fund, etc. 1st Rep. 68, 2nd Rep. 30, 3rd Rep. 31, and 4th Rep. 22; hereinafter set forth in full in support of the 19th Ground of our First Specification of Error, in Division XIX of this Argument. For the first five years of the life of the Act of Secretary expressly placed the same construction on "estimated cost" that we do, and so reported to Congress, and there was no adverse action.

g. We challenge the industry of able counsel on the other side to point out when or where, at any time, since December 5, 1905, when the venerable Ethan Allen Hitchcock, as Secretary, reported to Congress that

(Division XVIII, Pars. g and h.)

> "One of the most important provisions of the law is contained in this section (4): namely, that requiring that each project undertaken shall repay the ESTIMATED cost of its construction. This is an effective safeguard against undertaking visionary or unprofitable projects, etc."

that any Secretary of the Interior, or Congress, has receded from that position, or has attempted to give a different meaning to "estimated cost."

h. The attention of Congress, as to the meaning of "estimated cost" was directly challenged in

House Doc. No. 1262, 61st Cong., 3rd Sess.,

wherein President Taft, on January 5, 1911, transmitted and approved the report of the Board of Army Engineers, appointed under the provisions of the Act of June 25, 1910, 36 Stat. 385, to examine and report upon the reclamation projects, wherein, in Par. 25, at page 17, the following appears:

> "If on the other hand, the term 'estimated cost,' as used in the act, should hereafter be judicially determined to mean the preliminary estimate made when the project was undertaken, very large losses to the fund will occur."

And we do not find that the Secretary made any report to Congress setting forth that "estimated cost meant the actual cost computed after 12 or 13 years of work; nor do we find that Congress took any adverse action, or attempted to interpret "estimated cost" in any different way than it did when the Act was enacted in 1904, as shown in support of our 20th Ground of the First Specification of Error.

(Division XVIII, Par. 1, and Division XIX, Subd. 1.)

i. Nor do we find any adverse action of Congress on the Secretary's report thereto, in

3rd Ann. Rep. 51, that

"The Yuma Project * * * involves the reclamation of about 130,000 acres at $40 per acre."

Nor any adverse action on his report in

4th Ann. Rep. 97,

where he states: "The ESTIMATED COST of the project * * * is $3,000.000."

Therefore, is not the estimated cost of the Yuma Project fixed by law, as construed by Congress, at $40 per acre—$3,000,000?

## XIX.

## CONGRESS INTENDED THE ESTIMATED COST TO BE RETURNED TO RECLAMATION FUND.

Our 19th Ground of the First Specification of Error attacks the finding and decision of the Trial Court (Rec. 553) that Congress intended that the actual, and not the estimated, cost of the construction of all irrigation projects under the Reclamation Act should be assessed against the lands, and paid into the Reclamation Fund, and in that we reach one of the most vital questions in this case, and we offer the following in support of our contention that the Trial Court erred in so doing:

(Division XIX, Subd. 1, Par. a.)

1.

## THE COMMON AND DICTIONARY MEANING OF ESTIMATED:

Before determining what Congress intended, let us see what the word "estimated," or "estimate," means:

a. If we were to ask the man in the street, in the office, in the school—anywhere—the meaning of the "estimated cost" of the construction of a building, or other structure, we should receive the instant and unhesitating reply that it is the amount figured out in advance of the actual construction by the owner, architect, engineer, or contractor. If we search the dictionaries for a more accurate definition we find in

> Webster's New International: Estimate v. t. estimated (Latin, aestimatus, p. p. of aestimare). (See Esteem (which gives, "to value," as the meaning of L. estimare).
>
> 1. To form an OPINION, to guage, to judge.
> 2. To fix the worth, value, size, extent, etc., ESPECIALLY ROUGHLY or in a GENERAL way; to appraise, to estimate the value of land. * * *
> 3. To calculate APPROXIMATELY some particulars of, AS THE PRICE TO BE CHARGED FOR WORK * * * etc., as to estimate a job of printing. * * *
>
> Estimate, N., 1., a value or rating, ESPECIALLY FROM INCOMPLETE DATA; ROUGH or APPROXIMATE calculation; as, an ESTIMATE of the COST of a building.

(Division XIX, Subd.'s 1 and 2.)

2. A STATEMENT of the AMOUNT for which certian work WILL BE DONE by one who wishes to do it. * * *

Syn.: * * * An estimate is AN APPROXIMATE JUDGMENT of value, etc.
Estimation, N.

3. An opinion or judgment of worth, etc., of anything, ESPECIALLY if formed without using precise data. * * *

and to like effect, in slightly varying language, are all the other dictionaries. All definitions excluding the thought that an estimate of cost, or estimated cost, can possibly mean the determined price of a structure after its completion and all the actual, or the real, cost has been accurately entered in a ledger and added up and the gross sum accurately computed and settled. In every case it conveys the meaning of a previous computation.

2.

## HOW THE COURTS HAVE DEFINED "ESTIMATED."

We should next inquire what meaning the Courts have given to those words, before determining what Congress intended, for a vast majority of the members of Congress are learned lawyers, and no doubt some of them, at least, when they voted for the Reclamation Act of 1902, must have had in mind how the Courts had defined those words. We find that the Courts, prior and subsequent to the passage of the Reclamation Act, had spoken as follows:

"The word 'estimate' precludes accuracy."—Shipman vs. State, 43 Wis., 381.

"To 'estimate' means to judge and form an opinion of the values from imperfect data; to fix the worth of roughly or in a general way."—McCormick vs. State, 61 N. W., 99.

"The ordinary meaning of 'estimate' is to calculate roughly, or to form an opinion as to the amount from imperfect data. In this sense, the term 'estimated capacity of a car' means substantially the SUPPOSED or PROBABLE capacity of the car."—Lousville, etc., Ry Co. vs. Chandler, 72 S. W., 805.

"The word 'estimate' percludes accuracy, and its ordinary meaning is to calculate roughly or to form an opinion from imperfect data, and the word 'estimate' has no more certainty that the word 'about' or 'more or less' "—Bautovich vs. Lumber Co., 56 So. 1026.

" 'Estimate' as defined by Webster is to judge and form an opinion of the value of, from imperfect data; to fix the worth roughly or in a general way."—National, etc., Ins. Co. vs. Duncan, 98 Pac. 634.

"The word 'estimate' in a law requiring a City Council, before making a contract for building bridges, etc., an ESTIMATE OF THE COST thereof shall be made by the proper officer, and submitted to the Council, and no contract shall be entered into for the work for a price exceeding the 'estimate' does not mean a correct statement of the cost of such work, but an approximation of such costs * * *.'—City of Booneville vs. Rogers, 101 S. W. 1120.

"The term 'estimates' is NOT an appropriate expression to indicate the DETERMINATION of the

(Division XIX, Subd's. 2 and 3, Par. a.)

COST of PAST CONSTRUCTION."—O'Connell vs. Behan, 124 Pac. 1038

"Where the law requires an engineer's 'estimate of the cost' of paving before a contract is made, the word 'estimate' means the fixing of the worth or value roughly or in a general way, sometimes from imperfect data."—City vs. Stephens, 141 S. W. 1111.

"An 'estimate' means a rough calculation."—Gratz vs. City, 145 S. W. 870.

"'Estimate' is a valuation based on opinion and roughly made from imperfect data."—Brown vs. Cornwell, 60 SE. 623.

"The word 'estimate' is one of common use, and is therefore to be taken in its natural, plain, obvious and ordinary signification."—Lewis Sutherland Stat. Const. Sec. 358, 2nd Ed.

We contend that "estimated cost of construction" is its own best definition; it means just what it says; and it clearly and positively does NOT mean the computed actual, real cost of construction determined after twelve years of active work, but means in this case the original estimate of cost made 13 years before, in May, 1904.

3.

WHAT CONGRESS UNDERSTOOD BY "ESTIMATED COST":

We believe that the following record and proceedings of Congress show that it fully understood the meaning of the words "estimated cost," and that it clearly intended that it was the estimated, and not the actual, cost

that was to be charged against the lands benefitted, and returned into the Reclamation Fund.

a. Senator Hansbrough had the Reclamation Bill in charge in the U. S. Senate February 6, 1902, and we find the following colloquy between him and Senator Spooner in

Vol. 35 Cong. Rec. Part 2, Page 1384

Mr. SPOONER (Wis.)—Will the Senator allow me to ask him a question?

Mr. H.—Certainly.

Mr. S.—Is the Senator speaking of a bill that has been reported?

Mr. H.—It has been reported from the Committee on Public Lands.

Mr. S.—If I may inquire of the Senator, does the bill provide for the appropriation to the various arid land State and Territories of the proceeds of the sales of arid lands?

Mr. H.—The proceeds from the sale of the lands in those States and Territories.

Mr. S.—Who is to expend the money?

Mr. H.—The Secretary of the Interior.

Mr. S.—It has to be done by the National Government?

Mr. H.—Yes, sir.

Mr. S.—BY CONTRACT?

Mr. H.—BY CONTRACT.

Mr. S.—Are those contracts limited in amount to the proceeds in the Treasury for that purpose?

Mr. H.—Absolutely! There is a provision in the bill to the effect that no contract shall be made for an amount exceeding the amount of money in the Reclamation Fund.

(Division XIX, Subd. 3, Par. a.)

And in the same speech, on the succeeding page of the same record, the following appears:

> "A system of reclamation is practicable only in the sense that certain broad principles are to be clearly established as to what classes of works may be built by the government. Each individual project should be weighed on its merits and with reference to these principles. Each large item should be considered and the construction of the work authorized only AFTER CAREFUL EXAMINATION AND REPORT by impartial experts. Such reports should show the location, capacity, COST, and benefits to be derived."

We contend that, the "cost" referred to by the Senator in charge of the bill, to be shown by the reports of impartial experts after CAREFUL EXAMINATION, without which no work should be authorized, is the "estimated cost of construction" figured out in advance of the determination of the practicability of the project, and not the actual or real cost computed 13 years thereafter. At that time the Senate Bill did not have appended to Section 3 thereof the proviso that now appears in Section 3 of the Act, requiring the Secretary of the Interior, upon the completion of the surveys and the necessary maps, etc., to determine if projects were practical and advisable.

Report No. 254 of the Senate, Jan. 20, 1902.

That proviso was added in the House by the Committee on Irrigation of Arid Lands: See

H. R. Report No. 1468, p. 17.

(Division XIX, Subd. 3, Par. b.)

b. We deem it significant that the language: "that such surveys should be prosecuted diligently to completion, and upon the completion thereof, and the necessary maps, plans and ESTIMATES OF COST, the Secretary of the Interior shall determine whether or not said project is PRACTICAL and ADVISABLE," was not then in the bill, when Senator Hansbrough spoke in the Senate as above quoted. It is also significant that Section 4, when Senator Hansbrough spoke, was not in the form finally enacted, but was entirely rewritten in the House. See

H. R. Report 1468, page 17.

We have emphasized the word "CONTRACT" by capitalization, in the foregoing colloquy between the two Senators; for we believe that this law suit and many other unnecessary woes have flowed from the disregard by the Reclamation Service of what is certainly the spirit of the law as set forth in that colloquy. The abandonment of the policy FIRST ADOPTED BY THE RECLAMATION SERVICE of letting contracts and the adoption of the plan of doing the work by days labor and the direct purchase of materials by the government, under what has become to be technically known in U. S. Reclamation circles as "FORCE ACCOUNT," permitted and encouraged by the opinion of the Assistant Attorney General on April 16, 1906, published in the 34 L. D. 567, has led the government into a maze of inefficiency and extravagence in the reclamation of arid lands; and because someone, either the government on the one hand, or the settler on the other hand, is bound to suffer loss, has led to such harsh decisions as we be-

lieve the Lower Court rendered in this case. But even if the bill as urged by Senator Hansbrough had been enacted into the law as it then read, to the effect that reclamation projects should only be authorized AFTER CAREFUL EXAMINATION AND REPORT BY IMPARTIAL EXPERTS, showing the location, capacity, cost, and the benefits to be derived therefrom, and that the expenditures would have to be made under CONTRACT, we contend that no reasonable person could plausibly contend, in view of the well established meaning of the word "estimated," that Congress intended that the ACTUAL cost of the project should be returned and not the ESTIMATED cost: and such contention, as we see it, is impossible in face of the House amendments and the law as finally enacted.

c. When we follow the bill into the House we find it there amended as to Sections 2, 3 and 4 as finally enacted, which we here set forth for the convenience of the Court:

"Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, be-

fore giving the public notice provided for in Sec. 4 of the act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided, that the commutation provisions of the homestead laws shall not apply to entries made under this act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary

(Division XIX, Subd. 3, Par. c.)

funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon the lands in private ownership which may be irrigated by the waters of ths said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

We find the following from the Majority Report of the House Committee on the Irrigation of Arid Lands:

H. Report 1468, supra, p. 11,

"Neither can irrigation enterprises, great or small, particularly those of the character which the government would undertake, be projected without DUE AND CAREFUL EXAMINATION, or completed in a brief period of time."

And Mr. Mondell, who had the bill in charge in the House spoke, among other things, at

Vol. 35 Cong. Rec. Part 7, page 6678,

as follows:

"It having been ascertained that a sufficient supply of water for the irrigation of the lands in question

was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located. He would THEN ESTIMATE THE COST OF THE PROPOSED WORKS, and having determined upon their construction would advertise for bids for same, and would thereupon give notice of the limit of area per entry under the particular project, which limit under the provisions of the act would represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question. At the same time notice would be given of the charges to be made per acre upon each entry and upon lands in private ownership which might be irrigated by the waters of the works in question, which charges are to be determined with a view of returning to the reclamation fund the cost of construction, and be apportioned equitably.

"The notice above referred to having been given, all entrymen on the lands proposed to be irrigated are bound by its provisions and all entries of the public lands subject thereto. The work of construction having been inaugurated, it is expected that settlers under a project would be able to secure employment thereon and thus support themselves until such times as water was available for their lands and crops could be produced."

But more significent yet is the Minority Report of the House Committee on Irrigation of Arid Lands, H. Report 794, signed by Congressman Ray and Jenkins, set forth in:

Vol. 35 Cong. Rec. Part 7, pp. 6693-6.

Mr. Ray, of New York, led the opposition to the bill, and, on June 12, 1902, he made an extended and forcible speech against it:

Vol. 35 Con. Rec. Part 7, pp. 6682-93,

in which he assailed it from every angle. He took the report of the U. S. Geological Survey on the Milk River, Montana, Project (then purely speculative, of course, as there was no law under, or money with which, to construct it), and he read the report into his speech, dissecting and adversely criticising it as he went along, and he set forth therein the following Estimate of Cost, as it is copied from the foot of the second column in:

Vol. 35 Cong. Rec. Part 7, p. 6683.

ESTIMATED COST OF ST. MARY DAM AND CANAL SOUTH FORK TO MILK RIVER

| | |
|---|---|
| Dam | $ 22,000 |
| Tunnel | 12,000 |
| Head Gates | 10,000 |
| Head to Spider Lake | 245,000 |
| Spider Lake to North Fork of Milk River | 288,400 |
| Two sets of water gates | 4,000 |
| Siphon, North Fork | 67,000 |
| North Fork to South Fork Milk River | 360,800 |
| | $1,009,300 |
| Contingencies | 109,000 |
| Engineering | 54,700 |
| Total | $1,173,000 |

(Which bears a striking resemblance to many of the estimates made for the Yuma Project on pp. 164 to 198, Rec.)

Thereby giving Congress an autopic demonstration of the meaning of "Estimated Cost." He appended to his speech the Minority Report of his committee, H. Report 794, from which the following is taken at p. 6693 of the same volume of the Cong. Rec.

> "The cost of construction, maintenance and operating one of the reservoirs may be ESTIMATED; but any estimate will be far from the ACTUAL EXPENSE. If the government commences the construction of such reservoirs at different points and the proceeds of the sales of public lands are exhausted before they are COMPLETED and put in operation, a demand will immediately be made for an appropriation out of the Public Treasury on the plea that the government having gone into the business of irrigation, and having expended millions for incompleted work, such works must be preserved and completed in order to be of any value whatever. Such pleas are usually successful, but the result would be either that the government must abandon its incomplete work, or tax all the people for the benefit of a locality."

That statement is not only prophetic, but it is certainly a challenge to the advocates of the bill to explain, as is now earnestly contended by the appellees here, and as has been decided by the Lower Courts that the bill (and the Act), did not mean what it says. No advocate of the bill arose in his place to advise the gentleman from New York that he was entirely mistaken as to the meaning of the words "Estimated Cost;" that the word "Estimated" as used in the bill, whatever had been its natural, plain, obvious and ordinary signification; and no matter how the dictionaries had defined it, and how the Courts had construed it; and no matter

what might be the natural, plain, obvious and ordinary signification of that word in the future, and no matter how the dictionaries would define it, or how all courts (except U. S. Courts), should construe it, the secret meaning of the words "Estimated Cost" in the bill was the ACTUAL COMPUTED COST arrived at by the Director of the Reclamation Service some thirteen years after some particular project should have been commenced; and that the word thereupon in the same Section 4 of the bill did not mean "IMMEDIATELY AFTER," but some thirteen years thereafter; and that really the fears of the gentleman from New York were entirely unfounded, and that there was no possible chance of the "estimate" being far from the actual expense." Nor did any advocate of the bill advise the gentleman from New York, in effect that: "It is true that the owners of private lands, and the settlers upon public lands, will be led to believe that the bill means what it says, and that the words 'estimated cost' can have no other meaning than their natural plain, obvious and ordinary signification; and the landowners will be induced to mortgage their homes to pay the originally estimated cost, believing in and relying upon the representations of the high officials of the Interior Department that the act means what it says; and that they, the high officials, had endeavored "to cover all contingencies, and the estimates of cost have been liberal" (Trans. of Rec. p. 225); but that thereafter the mortgagors, and their successors in title would ascertain, after some thirteen years of waste and waiting, that the

act would not mean what it says, and that the finally computed, ACTUAL COST would have to be paid, even though it should be more than twice the ESTIMATED COST." No such shocking, Machiavelian doctrine was announced; and within five days thereafter the bill became a law; and we respectfully contend that it means what it says, and that the Lower Courts erred in holding that Congress intended that the ACTUAL, and not the ESTIMATED, cost should be returned into the Reclamation Fund.

(Division XX, Subd. 1.)

## XX.

## HOW "ESTIMATED COST" SHOULD BE CONSTRUED.

In our 20th Ground of the First Specification of Error we attack somewhat the same holding of the Trial Court as that set forth in the 19th Ground, couched in somewhat different language, with the additional holding that the term "Estimated Cost" must be interpreted and construed so that the entire cost of construction must be returned to the Reclamation Fund (Rec. 554). In support of this specification we advance the propositions that the Reclamation Act is self-explanatory; that the intent of the law-makers having been ascertained that intent must be put into effect that its terms are so unambiguous as to forbid interpretation; and that, even if there were any doubt on either of those three propositions, the act has been so frequently construed by the officer whose duty it was to enforce it, and others, as to take the question of its interpretation and construction out of the realm of controversy, as follows:

### 1.

### THE RECLAMATION ACT ITSELF CONSTRUES "ESTIMATED COST."

(a) Instead of the Reclamation Act by its own terms raising a doubt as to the meaning of "the estimated cost of construction," Sec. 2 thereof clearly and unequivocably sustains our contention that "the estimated cost" means the estimated cost determined PRIOR to the beginning of the work, and not some computed, in whole or in part, actual or real, cost figured out 13 years later. Sec. 2 requires the Secretary of the

(Division XX, Subd. 1, Par. a and b.)

Interior to report to Congress each year the results of the surveys, etc., giving ESTIMATES of COST of all CONTEMPLATED works? * * *; ALSO THE COST of works in process of construction as well as those which have been completed." And again in Sec. 3 it is provided that the surveys shall be prosecuted diligently to completion, and upon completion thereof, and the necessary maps, PLANS AND ESTIMATES OF COST, the Secretary of the Interior shall determine whether or not the porject is PRACTICABLE AND ADVISABLE. That provision points absolutely and irrevocably to when the estimated cost of construction shall be determined PRIOR to the determination of the practicability and advisability of undertaking the work. And in the very nature of things that must be the time to fix the estimated cost of construction; for while a project might be entirely practicable as an engineering feat, its advisability could only be determined in view of what it was going to cost.

b. Then Sec. 4, provides that UPON the DETERMINATION by the Secretary that the project is practicable he shall give notice, etc., of the charges, etc., per acre, etc. SAID CHARGES shall be DETERMINED WITH A VIEW of returning to Reclamation Fund the ESTIMATED COST of the construction of the project. That language so plain, simple and unambiguous that but one meaning can be taken from it—that is, that when ever the charges are fixed that they shall be determined so that the estimated cost, and the estimated cost ONLY, shall be paid back into the Reclamation Fund.

2.

THE LEGISLATIVE INTENT HAVING BEEN ASCERTAINED, THAT INTENT SHOULD BE GIVEN EFFECT.

(a) We believe that we have clearly shown in the preceding, 19th, division of this argument, and in the preceding subdivision 1 hereof, that Congress intended that only the estimated cost should be returned into the Reclamation Fund:

"The INTENT is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that INTENT."

Lewis Suth. Stat. Constr., Sec. 363—citing:
U. S. vs. Chase, 135 U. S. 255,
Wis., etc., R. Co. vs. Forsythe, 159 U. S. 46,
McKee vs. U. S., 164 U. S. 287,
U. S. vs. Goldenberg, 168 U. S. 95,
Hawaii vs. Mankichi, 190 U. S. 190,
with numerous other Federal and State authorities.

"The INTENTION of the legislature in enacting the law is the LAW ITSELF, and must be enforced when ascertained."

Ibid. Sec. 363—citing:
Edwards vs. Morton, 92 Tex. 152; 46 So. W. 792.

3.

WHEN THE MEANING OF THE STATUTE IS PLAIN IT MUST BE FOLLOWED.

(a) Even if we had not ascertained the INTENT of Congress in enacting the Reclamation Act its terms are so plain, certain and unambiguous, as we contend, that there is nothing for the courts to do but to enforce the statute as it reads. As heretofore pointed out in sub-

divisions 1 and 2 of the 19th Division of this argument, supra, pp....., ESTIMATED COST can have but one possible meaning in this case, and that is, SOME SUM LESS THAN FORTY DOLLARS PER ACRE, as declared by the Secretary in his official announcement, under date of May 10, 1904 (Plaintiffs.' "Exhibit 4" Rec. 201).

> "If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless."
>
> Lewis Suth, Stat. of Constr., Sec. 363—citing:
> U. S. vs. Hartwell, 6 Wall. 385-95,
> Ogden vs. Strong, Fed. Cas. 10460,
> U. S. vs. Wiltberger, 5 Wheat. 95,
> Ruggles vs. Illinois, 108 U. S. 526,
> and numerous other authorities.
>
> "It is beyond question the duty of courts in construing statutes to give effect to the INTENT of the law-making power, and seek for that INTENT in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and EXPRESS PLAINLY, CLEARLY and DISTINCTLY the SENSE of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation.' The statute itself furnishes the best means of its own exposition; and if the SENSE in which words were intended to be used can be clearly ascertained from its parts and provisions, the INTENTION thus indicated will prevail without resorting to other means of aiding in the construction. Very strong expressions have been used by the courts to emphasize

the principle that they are to derive their knowledge of the LEGISLATIVE INTENTION from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived."

Ibid. Sec. 366—citing:

Schooner Pauline vs. U. S., 7 Cranch 152,

Denn vs. Reid, 10 Pet. 524,

Gardner vs. Collins, 2 Pet. 58,

Sturgis vs. Crowninshield, 4 Wheat. 202,

and numerous State authorities.

"The legislature must be understood to mean what it has plainly expressed, and this excuses construction."

Ibid. Sec. 366:

U. S. vs. Fisher, 2 Cranch 358,

U. S. vs. Hartwell, supra,

Denn vs. Reid, supra.

"'When the INTENTION of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction. It is not allowable to interpret what has no need of interpretation. To attempt to do so would be to exercise judicial functions. There is no safer or better settled canon of interpretation than that when language is clear and unambigous it must be held to mean what in plainly expresses.' These views of eminent courts are supported by numerous cases."

Ibid. Sec. 367—citing:

Swarts vs. Siegel, 54 C. C. A. 399,

Yerke vs. U. S., 173 U. S. 439,

Hamilton vs. Rathbone, 175 U. S. 414,

and numerous other State and Federal authorities.

(Division XX, Subd. 4, Par. a.)

4.

## HOW "ESTIMATED COST" HAS BEEN INTERPRETED.

While we believe that we have conclusivelly shown that it is plain that the INTENT of Congress, in the passage of the Reclamation Act, was that the ESTIMATED, and not the ACTUAL, cost, should be returned; and have shown that even if the INTENT of Congress had not been ascertained the language of the statute is so plain, certain and unambiguous that but one construction can be given to it.

(a) Yet if there should be even a lingering doubt on either of those propositions we take the position that the Secretary of the Interior, whose duty it was to enforce the act, did frequently in the years 1902-3-4 and 5 himself give the same interpretation to the act as to the meaning of "Estimated Cost," that we now contend for:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authority need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."
>
> Pennoyer vs. McConaughy, 140 U. S. 125,
>
> United States vs. Moore, 95 U. S. 760, 763.

Also do we understand it to be the doctrine laid down in:

so strongly relied upon by the appellees. In obedience to the commands of Section 2 of the Reclamation Act, the Secretary of the Interior made his First Report to Congress on December 3, 1902, the first Report being a volume of 317 pages. Those reports have been made annually up to the present time; the 15th being made in December, 1916, in a volumne of over 800 pages. Beginning with the First Report, Dec., 1902, at page 13 thereof taken from the letter of transmittal from the Director of the U. S. Geological Survey, then in charge of the operations under the Reclamation Act, we find the following:

"In nearly every locality there are alternative methods of reaching the desired end, the relative merits of which cannot be determined until careful ESTIMATES have been made," and

"The final determination of the reclaimable area rests upon a summation of ALL OF THE FACTS OF FEASIBILITY AND COST, so that it can be stated only as the last of series of ESTIMATES. That is to say, in each project the conditions are being sifted down to a condition where judgment must be exercised whether, for instance, it is better to reclaim a certain body of good land at a cost of $12 per acre or a larger body of less valuable land at $10 per acre. This final judgment can only be passed when all of the FACTS OF COST OF EACH DETAIL, expense of maintenance, the permanence of structures, the character of soil and climate HAVE BEEN WORKED OUT WITH GREAT CARE."

(Division XX, Subd. 4, Par. a.)

We find the following in

First Report R. S. p. 68, under "Cost per Acre,"

"After determining upon construction the Secretary of the Interior is required to give public notice of the lands to be irrigated under the project and of the limitation of area per entry which he may deem advisable and which shall be such as may be reasonably required for the support of a family upon the particular lands involved. This notice will also prescribe the charges wich are to be made per acre upon said entries and upon land in private ownership, which may be irrigated by the waters supplies from the said works. He will also prescribe at this time the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when the payments shall commence. It is provided that in fixing the charges per acre, the sum shall be determined with a view of returning to the Reclamation Fund THE ESTIMATED COST OF THE PROJECT, and the same is to be apportioned equitably."

We find the following in 2nd Ann. Rep. R. S. 30

"The Secretary is also to determine the charges which should be made per acre upon the entries and upon lands in private ownership which may be irrigated. These charges are to be determined with a view of returning to the Reclamation Fund the ESTIMATED COST OF CONSTRUCTION. This is believed to be one of the most important limitations

and safeguards of the law, since it puts the whole matter of reclamation upon a strictly business basis and guards against wasteful or useless construction. Without this provision it would be almost impossible to administer the law fairly, since it would leave open the door to other influences than those of merit alone. It is believed that this matter of refunding the cost should be made at all times the prime requisite in any project, and that NO UNDERTAKING SHOULD BE BEGUN WHERE IT IS NOT REASONABLY SURE THAT THE COST WILL BE REFUNDED WITHIN A SHORT TIME."

In the next two Reports we find the following:

3rd Ann. Rep. R. S., p. 31, 1904,

"One of the most important provisions of the law is contained in this section, namely, that requiring these payments of the ESTIMATED cost of construction. This is an effective safeguard against undertaking visionary or unprofitable operations, and puts the operations under the law on a sound basis. The fact that each project must return its costs puts out of consideration at once a large number of dubious or chimerical schemes that are continually being exploited and removes the temptation to try expensive experiments."

And we find almost precisely the same language in the

4th Ann. Rep. R. S., pp 22 and 23,

as follows:

"One of the most important provisions of the law is contained in this section, namely, that requiring

that each project undertaken shall repay the ESTIMATED cost of construction. This is an effective safeguard against undertakings visionary or unprofitable projects, and puts the operations under the law on a sound basis. The fact that each project must return its cost cuts out of consideration at once a large number of dubious or chimerical schemes that are continually being exploited, and removes the temptation to try expensive experiments."

(b) Those last three declarations of the Secretary are, we contend, conclusive of what was in the mind of that officer in the years 1903, 1904, and 1905. The cost of construction should be estimated before the beginning of any undertaking so that it would be REASONABLY SURE that the cost would be refunded; which would also be a guard against WASTEFUL and USELESS construction, and an EFFECTIVE SAFEGUARD against undertaking VISIONARY or UNPROFITABLE SCHEMES, and removes the TEMPTATION to try EXPENSIVE EXPERIMENTS. Can it, we ask, be sanely urged that the Secretary could have had in mind that all sorts of projects, wasteful, useless, visionary, unprofitable, dubious, chimerical, expensive and experimental, or what-not, should be undertaken without the estimated cost of construction being determined and without any reasonable assurance that the projects or any of them, including the irrigable lands embraced therein, would be worth the actual cost of construction, and that work should continue thereon for thirteen years before the cost would be computed and the owners of the pri-

vate lands therein, who had mortgaged their lands half a generation before, to secure the payment of the "estimated cost," informed of the amount of their mortgages. The mere statement of such an appalling absurdity is its own refutation.

(c) It is significant and worthy of note that no such declaration of the Secretary appeared in his reports to Congress after the Fourth Report on December 5, 1905. Immediately thereafter there was a change of policy on part of the Reclamation Service. The phrase "force account," theretofore, and now, unknown to the lexicons, was created, or, at least, seen written in publications referring to the work of the Reclamation Service; and on April 16, 1906, the Asistant Attorney General to the Secretary of the Interior furnished a learned and elaborate opinion to that officer,

34 L. D. 567,

to the effect that "may" in Sec. 4, relating to the letting of contracts, did not mean must, and that "force account" was legal.

(d) But the Secretary of the Interior was not alone in his iterpretation of the meaning of the words "Estimated cost." Later, Jan. 1910, there was a joint committee of both houses of Congress created for the purpose of investigating the Department of the Interior and the Reclamation Service. This committee, consisting of Senators Knute Nelson, Frank P. Flint, George Sutherland and Elihu Root, and Representatives Samuel W. McCall, Marlin E. Olmsted and Edwin Denby, et al, in dealing with the provisions of Section 4 of the Recla-

mation Act, and giving the Public Notice of the charges per acre, etc., we find the following language in their majority report, see:

Senate Doc. No. 719, page 68, 61st Cong, 3rd Ses.

"The object of this important provision is to advise the settlers as to the cost per acre of the lands they contemplate entering under the homestead law, as well as other landowners, before obligating themselves to pay their share of the cost. The rate may be so high that the homestead settler can not see his way clear to enter the land at such cost, and the private landowner may regard the cost as greater than he can stand or is willing to obligate himself to pay."

Continuing further on pages 84 to 85 of said report, the committee said:

"Under the law, as we have already pointed out, at the time a project is adopted and contracts let for the work, notice must be given to homestead settlers and to private owners of the estimated cost per acre which will be entailed by the construction and completion of the project upon the lands to be irrigated, to the end that the settlers and private owners may be advised in advance as to the ultimate cost of their lands. From the evidence it appears that the estimates of cost thus given have in some instances been far below the ultimate and real cost. The following is an example of this, as appears from the following testimony:"

(Here follows, in the Report, some excerpts from a proceeding where Mr. A. P. Davis of the Reclamation Service testified concerning the original estimate of cost of the Klamath Project being $20 per acre, and it being finally announced by the Secretary of the Interior at $39 per acre.)

Whereupon the committee expresses itself as follows:

"A SMALL DISCREPANCY MAY BE AND IS IN THE NATURE OF THE CASE UNAVOIDABLE, BUT SUCH WIDE DIFFERENCES AS APPEAR IN THE INSTANCE CITED SEEM UNJUSTIFIABLE."

The distinguished names signed to that report should give it some weight.

(e) By 1910 the Reclamation Service had got into deep water financially, and in accordance with the provisions of the Act of June 25, 1910 (36 Stat. 835), a Board of Army Engineer Officers of the United States Army was appointed to examine all reclamation projects and to make recommendations concerning the expenditure of the $20,000,000 realized in Certificates of Indebtedness to be isued under the act. The board was convened by special order No. 156, War Department, July 6, 1910, with directions to report to the Secretary of the Interior. During the summer of 1910 they made examinations of the various projects; and among other matters that board reported, as follows, in:

House Doc. 1262, 61st Cong. 3rd Sess. page 17.

25. RETURNS TO THE RECLAMATION FUND.

"The Reclamation Act contemplates the return to the fund of the estimated cost of the different proj-

ects and the work has been prosecuted on that basis. The estimated cost is held by the Reclamation Service to be that officially announced by the Secretary of the Interior when the project is opened, not the preliminary estimates made when he project was undertaken, as was assumed by many of the owners of private lands within the projects. On the assumption that the announced building charge is the estimated cost contemplated by the act, the losses to the Reclamation Fund, except on four of the projects, which will be referred to heareafter, will be relatively small, though, by reason of the projects undertaken, the repayments will extend over many years. IF, ON THE OTHER HAND, THE TERM "ESTIMATED COST," AS USED IN THE ACT, SHOULD HEREAFTER BE JUDICIALLY DETERMINED TO MEAN THE PRIMARILY ESTIMATE MADE WHEN THE PROJECT WAS UNDERTAKEN, VERY LARGE LOSSES TO THE FUND WILL OCCUR."

There certainly will be loss if the term "Estimated Cost" is given its "natural, plain, obvious and ordinary signification;" but that loss should fall upon the government of the United States, which has been unfortunate in the selection of its agents and employes, and it should not fall upon the FAULTLESS and HELPLESS WATER USER who mortgaged his land to SECURE THE PAYMENT OF THE "ESTIMATED COST."

(f) Before the decision in this case by Judge Sawtelle, on July 21, 1919, JUDGE DIETRICH, of the U.

(Division XX, Subd. 4, Par. f.)

S. District Court of Idaho, in

Payette-Boise W. U. Assn., vs. Cole, 263 Fed. 734 (which is cited, with some confidence, in the opinion in this case—Rec. 556 to 560), judicially determined that the term "Estimated Cost," as used in the Reclamation Act, means the PRELIMINARY ESTIMATE made when the project was undertaken, in the following language, which does not appear in the opinion of the Trial Judge, reading at page 738 Federal Reporter (first setting out, at page 733, the plaintiffs' contention, which is ours, that the Secretary was without power to fix the new and higher charges. See p. 556, Rec.):

"(1) But first as to the law:—Generally speaking, it is thought that plaintiffs' construction of Section 4 of the act is correct. The primary purpose of the law„ of course is to secure the settlement and reclamation of arid public lands. In its administration the first step is an investigation for the purpose of determining the feasibility of a propsed project. Such investigation necessarily involves some consideration of the probable cost, but apparently Congress was not content to have the Secretary base his estimate upon the opinion of engineers alone; he is first to let contracts for construction, and then he is to estimate the probable cost, and equitably apportion it to the lands to be reclaimed. Of this estimate and apportionment he is to give public notice, and thereupon prospective settlers may determine for themselves whether they will or will not settle upon the lands, and thus bind them-

selves to pay the published price for water. In case of settlement under such conditions, it is incompetent for the Secretary to increase the price at a later date, even if it turns out that the published estimate is insufficient to cover the actual cost."

That construction of the U. S. District Court of Idaho, we contend, is in consononce with the INTENT OF CONGRESS, the ORIGINAL INTERPRETATION of the Secretary of the Interior himself, the construction placed upon the act by the CONGRESSIONAL COMMITTEE, consisting of Senator Root and others, and with common sense, natural justice and equity.

## XXI.

## SECRETARY'S POWER TO "ESTIMATE" THE COST EXERCISED IN 1904—"FUNCTUS OFFICIO" IN 1917.

In support of our 21st ground of the First Specification of Error, that the Trial Court erred (Rec. 555) in holding the cost to have been estimated in 1917, we make the same contention that was made by the plaintiffs in the Payett-Boise case, supra, as stated by Judge Dietrich, that on April 6, 1917, the Secretary of the Interior was wholly without power to establish the charges of $75 per acre, for the reason that the time had passed for taking such action and that the authority conferred by law had been once exercised, and was functus officio; and in support of that contention we present the following:

### 1.

### WHAT THE LAW REQUIRES TO BE DONE.

We should first carefully consider the Reclamation

Act, and ascertain its directions as to how and when the charges per acre should be DETERMINED and FIXED:

(a) Sec. 2 AUTHORIZES and DIRECTS the Secretary of the Interior to make EXAMINATIONS and SURVEYS for irrigation works etc., and to report to Congress at the beginning of each regular session the results thereof, giving ESTIMATES OF COST of all CONTEMPLATED works, the QUANTITY, etc., of the land to be irrigated, and all FACTS relative to the PRACTICABILITY of each irrigation project; also the COST of the works in PROGRESS as well as those CONTEMPLATED.

(b) Sec. 3 provides that said surveys should be PROSECUTED DILIGENTLY to COMPLETION; and UPON the completion thereof and of the NECESSARY MAPS, PLANS and ESTIMATES OF COST the Secretary of the Interior shall DETERMINE whether or not said project is PRACTICAL and ADVISABLE.

(c) That UPON the DETERMINATION by the Secretary that any irrigation project is PRACTICABLE he may cause contracts to be let, etc., and THEREUPON he shall give public notice of the lands irrigable under such projects, etc.; also of the CHARGES which shall be made PER ACRE upon the entries and lands in private ownership within the project; and the said CHARGES shall be DETERMINED with a view of returning to the Reclamation Fund the ESTIMAETD COST of the construction of the project.

(d) We contend that the word "upon" in Section 3

where the Secretary is directed, "UPON THE COMPLETION OF THE SURVEYS" to DETERMINE the practicability of the project; and in Sec. 4 where the Secretary is directed, "upon" such determination, to give notice of the charges, etc., is an adverb of time, and means, "as soon as" or "at the time of" those happenings: That is in one case UPON THE COMPLETION OF THE SURVEY, and in the other UPON THE SECRETARY'S DETERMINATION OF THE PRACTIBILITY OF THE PROJECT:

Smith vs. Nesbitt, 2 Man. G. & S. 286, 287.
Brown vs. Clough, 39 Me. 566.

(e) Going back to the declaration of the Secretary of the Interior in the First Rep. R. S. p. 68, in the 4th subdivision of the 20th Division of this argument, page 116, supra, we notice that the Secretary of the Interior set forth that it was his duty "after determining upon" the construction of any project to give the notice required by Sec. 4 and to prescribe therein the charges to be made per acre, etc. The word "after" used there is also, we contend, an adverb of time, and means "immediately after:" See

Dowing vs. Wherrin, 49 Am. Dec. 139,
Theo. Seminary vs. Kellog, 16 N. Y. 83,
Appeal of Penn. Co. 10 Atl. 130,
In Re Swinbourne, 14 Atl. 850.

2.

THE SECRETARY DETERMINED THE FEASIBILITY OF THE PROJECT.

(a) The next inquiry will be if the Secretary, as re-

quired by Sec. 2, made EXAMINATIONS and SURVEYS and LOCATED the Yuma Project. We take it that the appellees will themselves answer that inquiry in the affirmative, but in the event that they do not, we point to:

3rd Ann. Rep. R. S. pp. 192 and 199.

made to Congress in December, 1904, which shows that in 1902-3, topographical maps had been made, and that in the winter of 1903-4 extensive surveys were made in connection with the project; that seventy-eight miles of canals had been laid out; the Laguna Dam located; levees provided for and the COST ESTIMATED. Appended to the report are one map and 3 plates, the map being almost a replica of the plat made part of the pamphlet, plaintiffs' "Exhibit 15" (Rec. 228). These preliminary surveys and locations cost the government of the U. S. $174,735.85:

9th Ann. Rep. R. S. p. 82.

(Something should have been accomplished for that much real money.)

(b) Upon the completion of the surveys did the Secretary have before him the "necessary Maps, Plans and Estimates of Cost?" The answer to that will be found in plaintiffs' "Exhibit 2" (Rec. 164 to 198). At page 165-6 Rec. will be found a list of twenty-six maps and drawings that were transmitted to the Secretary on April 8, 1904, with the Report of the Board of Consulting Engineers (Rec. 235). The same "Exhibit 2" will show estimates of cost for every concievable feature of the Yuma Project, at pages 168, 180-1-2 and 3 and 189,

Rec., is found quantitiy, etc., of lands to be irrigated, and from pages 187 to 198 we find the ENTIRE ESTIMATE reduplicated with slightly different figures. So there can be no doubt the Secretary had before him the NECESSARY maps, plans and "estimates of cost."

(c) The next inquiry is did the Secretary DETERMINE whether or not the Yuma Project was practicable and advisable; and that, of course, cannot be denied by the defendants for they are his inferior officers and employes managing the Yuma Project under his directions, as the same has been managed for some sixteen years. But, however, we find in the

3rd Ann. Rep. R. S. 193,

that the Yuma Project was DETERMINED to be practicable and feasible upon the Report of the Board of Six Consulting Engineers, consisting of Mr. Davis et al., on May 10, 1904, as is also shown by our "Exhibit 4." (Rec. 201), also

6th Ann. Rep. R. S. 74, and all the other R. S. Reports to and inclusive of 16 Ann. Rep. U. S. 68.

3.

THE SECRETARY "ESTIMATED THE COST" OF THE PROJECT.

(a) The Secretary having, as we have shown, DETERMINED the practicability and advisability of the project, under Sec. 3 of the act, having had before him the "necessary Maps, Plans and ESTIMATES OF COST, he must necessarily have ESTIMATED and DETERMINED the COST OF THE CONSTRUCTION of the

project before he declared it to be FEASIBLE and PRACTICABLE. That follows, as a matter of course, under the law.

(b) But we have the FREQUENT and EXPRESS STATEMENTS of the Secretary of the Interior that he ESTIMATED THE COST. First in his letter of May 10, 1904, to the Director of the Geological Survey, plaintiff's "Exhibit 4" (Rec. 201), also incorporated in the pamphlet, plaintiffs' "Exhibit 15" (Rec. 226.), where he states:

> "It appears that under the Yuma Project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of LESS THAN $40 per acre."

And in 3rd Ann .Rep. R. S., 51,

> 'The Yuma Project, on the lower Colorado River, as now outlined, involves the reclamation of about 130,000 acres at a cost of $40.00 per acre, the land being on both sides of the river.'

And at pages 63-4,

> "It is ESTIMATED that water can be carried to about 87,000 acres of land by gravity canals * * * The ENTIRE COST of this enterprise, provided all of the valley lands are irrigated as contemplated, will amount to about $40 per acre irrigated."

The same statement appears at page 199 of the same report, and we have the matter definitely settled in:

4th Ann. Rep. R. S. 97,

in the following language:

(Division XXI, Subd. 3, Par. b.)

"YUMA PROJECT

"Detailed information concerning the general plans and irrigable lands of this project are given in the Third Annual Report of the Reclamation Service. THE ESTIMATED COST OF THE PROJECT as given in these reports, is $3,000,000, which sum was set aside by the Secretary of the Interior WHEN THE PROJECT WAS ADOPTED. The amount of valley lands which will be irrigated is ESTIMATED at ABOUT 90,000 acres."

It is true that in some of these statements the Secretary that we have just set forth the ESTIMATE is qualified by the terms "LESS THAN" (see letter of May 10, 1904), and "ABOUT" (as in the estimate in the 3rd Ann. Rep.). But we contend that that is precisely what "Estimated Cost" means, as heretofore set forth in numerous authorities cited in support of the 19th ground of the First Specification of Error, at pp. 94-97, supra, among others, the following:

" 'ESTIMATE' has no more certainty than the word 'ABOUT,' or 'MORE OR LESS.' "

Bautovitch vs. Lumber Company, 56 So. 1026, supra.

But surely $75 per acre, as compared to "LESS THAN $40 per acre, or $35 per acre," as set forth in the pamphlet, plaintiffs' "Exhibit 15" (Rec. 225), is not "ABOUT," or "MORE OR LESS," or "RANGING NEAR." And we say with the Congressional Committee, headed by Elihu Root, that:

"A SMALL DISCREPANCY MAY BE AND IS IN THE NATURE OF THE CASE UNAVOIDA-

BLE, BUT SUCH WIDE DIFFERENCES AS APPEAR IN THE INSTANCE CITED SEEM UNJUSTIFIABLE."

4.

SECRETARY POWERLESS TO ESTIMATE COST IN 1917.

We deem it unnecessary to enter into a lengthy discussion as to the meaning of the phrase "functus officio," or to attempt to dissect the numerous cases wherein that phrase is used, other than to say that it means literally "having discharged his duty;" and as applied to the Secretary of the Interior in this case, it means that in the year 1904 he had performed his duty in ESTIMATING THE COST and DETERMINING the feasibility and practibiity of the Yuma Project, and that, therefore, his authority became exhausted and at an end.

20 Cyc. 858—Note 12,

and the numerous State and Federal authorities there cited. It is particularly unnecessary to enter into such a discussion in this case for the reason that Sec. 4 provides that the charges per acre shall be DETERMINED with a view of returning to the Reclamation Fund the ESTIMATED COST of the construction of the project. That DETERMINATION, as we have shown, was made in 1904, and was repeatedly stated by the Secretary in the most formal and official manner. For, incidentally, if we are to take his letter of May 10, 1904 (Rec. 201), to the Director of the Geological Survey, and made a part of, and extensively circulated with, plaintiffs' "Exhibit 15" (Rec. 226), as meaning nothing, and having

no binding effect upon anyone, and gotten up as a "come-on" to induce certain gullible landowners to mortgage their lands to secure whatever cost the Secretary might thereafter arbitrarily fix as the cost of the project (and that, we contend, is really the attitude assumed by the defendants in this case), we cannot treat his declarations in the Annual Reports to Congress, above quoted, in any such way as that! for those reports are required to be made annually to Congress by Sec. 2 of the act, and he was thereby required to give ESTIMATES OF COST OF ALL CONTEMPLATED WORKS, etc.; and therefore, we contend, those expressions as to the ESTIMATED COST OF THE PROJECT are CONCLUSIVE UPON THE DEFENDANTS in this case. Surgart vs. Baker, 229 U. S. 187, Read p. 198. The appellees contended below, and will no doubt contend here, sustained as they are by the holding of the two Lower Courts, that until the Secretary chose to issue a public notice under the provisions of Sec. 4 he was not required to DETERMINE the ESTIMATED COST OF THE PROJECT, and that he could delay the issuance of that public notice for fifty years if he felt so inclined, and that when issued he could INCLUDE, in the charges per acre set forth in such public notice, all the COSTS THAT HE SAW FIT that had actually accrued up to the time of the issuance of the notice, HOWEVER DELAYED THE NOTICE MIGHT BE. But of that more anon. But we contend, that WHENEVER, or HOWEVER, the public notice should be issue, that it SHOULD and COULD IN LAW, contain

(Division XXII, Subd. 1, Par. a.)

ONLY a charge per acre EQUAL TO, or NOT GREATER THAN, the ESTIMATED COST as DETERMINED AT, or BEFORE, the time of DETERMINING the practicability and advisability of the project—in this case on May 10, 1904.

## XXII.

## THE PUBLIC NOTICE.

In support of our 22nd Ground of the First Specification attacking the finding of the Trial Court (Rec. 560) to the effect that the Public Notice was not given in May, 1904, but on April 6, 1917, we urge the following three propositions: (1) That a Public Notice was not necessary to fix and determine the "Estimated Cost" of the project; (2) That if a Public Notice were necessary one was actually given within the letter and the spirit of the law; (3) That if it were not actually given it must in this case be deemed, in contemplation of equity, to have been given; on which we offer the following:

### 1.

### A PUBLIC NOTICE NOT NECESSARY TO FIX THE "ESTIMATED COST."

a. During the trial of this case and the discussion thereof leading up to the final decision below, the defendants urged and reurged, iterated and reiterated, the PUBLIC NOTICE! the PUBLIC NOTICE!! THE PUBLIC NOTICE!!! that nothing at all, practically, could be done unless some written document dubbed by somebody a "Public Notice" was actually issued by somebody and published in a newspaper somewhere under that particular name; and, as appears from the expres-

sion of the Court during the trial and in the opinion handed down, that cry had its effect upon, and that theory was adopted by the Trial Court (Rec. 313), and the Circuit Court of Appeals. The defendants urged, and the Lower Courts must have adopted, the view that without a "Public Notice" there could be no "Estimated Cost." Again we urge that that is a stupendous fallacy; that within the meaning of the law and in the nature of things the DETERMINATION of the ESTIMATED COST must have occurred BEFORE the issuance of any Public Notice, and that when the Public Notice should be issued, whenever that might be, that it must MAKE PUBLIC the ESTIMATED COST as originally FIXED and Determined. As a matter of fact the estimated cost is determined by the engineers who make the surveys and, in this case, were actually made by the engineers, as appears from our "Exhibit 2" (Rec. 164 and 198); and immediately upon the DETERMINATION of the FEASIBILITY of the project by the Secretary, of course, those ESTIMATES immediately have life and legal force. We now point out other official declarations as to when the project was determined to be feasible and practicabile:

> "The construction of the Yuma Project was authorized May 10, 1904."
>
> 6th Ann. Rep. R. S. 74,

and the same declaration is made repeatedly thereafter in the 7th, 8th, 9th and 10th, et esq., clear down to the 16th Ann. Rep. at page 68, made to Congress on December 4, 1916, four months before the issuance of the public Notice here in question; and after millions of dollars

had been expended by the defendants and their predecessors in office upon the Yuma Project. We take this position that, sometime prior to May 10, 1904, the Secretary of the Interior MUST under the law, have had before him, and, as a matter of absolute fact, did have before him, the estimates of cost for the Yuma Project; otherwise he could not and should not have determined the project practicable and advisable, and that therefore, as a matter of fact and law, when he authorized the construction of the project on May 10, 1904, he must have then estimated and actually did estimate, the cost; otherwise he and his subordinates, among others, the defendants, for the period of twelve years, had been UNLAWFULLY EXPENDING THE PUBLIC'S MONEY.

b. The making of the estimate of cost, and the determination of the charges per acre, of a reclamation project no more depend upon a notice, or the publication thereof, than the taking effect of an Act of Congress depends upon its being published in some book or newspaper. It may be so published, and when published it is more convenient to find, read, and understand; but it goes into effect, usually, on being approved by the President. There is nothing in the Reclamation Act that even by implication requires the estimates of cost or determination of charges to be made by or through a public notice of any kind. Section 3 provides that the Secretary shall determine if projects are practicable, etc., and that is a much more momentous function than determining the cost per acre; and yet it is fair to assume that no one will be so misguided as to urge that

the Secretary is required to make this determination through the instrumentality of a public notice. Sec. 4 requires the Secretary to DETERMINE the charges per acre with a view, etc., but there is no intimation as to when or how he shall make that determination, nor is there anything in law, reason, common sense or precedent requiring him to do it with or by a public notice, published or otherwise, any more than there is to require this court to publish its decision in this case, when rendered, in a newspaper. The determination of the charges per acre is one thing, and making known the result of that determination to the interested person is another. However that may be, one thing is absolutely certain, and that is: when the charges per acre are finally fixed, and public notice is given thereof, soon or late, prompt or slow, those charges MUST BE DETERMINED with a view of returning the estimated cost, etc., and any charges that may be fixed, and any published notice of them, whenever given, that does not conform to that law is absolutely void to the extent that they exceed the estimated cost of construction. Knowing in this case the estimated cost, we know what the charges should be.

2.

PUBLIC NOTICE ACTUALLY GIVEN IN 1904

a. Should it be determined that a Public Notice was necessary in order to fix and determine the estimated cost of the Yuma Project, we contend that such a notice was ACTUALLY GIVEN; and that it was given in a much more effective form, so far as actually notifying those who were interested, than the so-called Public

(Division XXII, Subd. 2, Par. b.)

Notice of April 6, 1917.

b. The fact to be considered in connection with the giving, of a Public Notice in 1904 is, as shown by plaintiffs' "Exhibit 5 to 13" inclusive, certain township plats certified by the Register of the U. S. Land Office at Phoenix, Arizona, where the land here involved is subject to entry, showing the status of those lands as being in public or private ownership on May 10, 1904. Those plats are not incorporated in the Record, by stipulation of the parties, for the reason that they would encumber it too much and for the further reason that the facts therein set forth are not the subject of dispute between the parties hereto. We believe that it will be admitted by the appellees that those plats show conclusively that on May 10, 1904, all of the irrigable lands within the Yuma Project and here involved, except about 6,000 acres, were in private ownership, either by the land having been patented or being subject to homestead or desert land entries made prior to the withdrawal of those lands under the Reclamation Act on July 12, 1902. Of those 6,000 acres practically all were located adjacent to the Gila River in Town. 8 So. Range 22 W., see Plat Rec. 228. There were no public lands in Town. 8 So. 23 W. and none in any part of the land designated as Tract "C" on the Plat, p. 9, supra, except about one hundred acres in T. 9 S. R. 24 W., and less than two sections in T. 10 S. R. 25 W. (These 6,000 acres should be distinguished from the 6,000 acres which are the subject matter of the 7th and 16th Grounds of the First Specification of Error, which only include about 1,000 acres of the 6,000 now discussed.)

Or, we may dispense with the plats, plaintiffs' "Exhibits 5 to 13" inclusive, and consult the table at:

5th Ann. Rep. R. S. 103,

and find therefrom that there was within the Yuma Project in 1904 at the commencement of the negotiations with the government, 76,000 acres of land, of which 55,242 was in the Yuma Valley, Tract "C," and 20,758 acres in the Gila River Valley, Tracts "A" and "B," of which 68,780 acres was in private ownership and, 7,220 acres were public lands, of which 1,230 acres was non-irrigable.

c. We should keep in mind that more than 92 per cent of the irrigable land in Tracts "A," "B" and "C" (Plat, p. 9 supra) were in private ownership in May, 1904, and should further keep in mind what the Secretary of the Interior, through his authorized agents, was seeking to achieve, that is, to secure a lien upon the lands in private ownership to secure the payment of the ESTIMATED COST of the project (no such security being necessary upon lands entered subject to the provisions, charges, etc., of the Reclamation Act (Sec. 3), and that such lien was to be secured through the instrumentality of the stock subscriptions, plaintiffs' Exhibits 14 (Rec. 209) and 27 (Rec. 274), into which was written, by reference, the Articles of Incorporation of the Water Users' Association, plaintiffs' "Exhibit 1" (Rec. 142 to 162), whereby:

> "The property of the Water Users is, in effect, mortgaged to secure the repayment of the ESTIMATED COST OF CONSTRUCTION."
>
> 3rd Ann. Rep. R. S., 55.

(Division XXII, Subd. 2, Par. d.)

d. A plan is outlined in a general way in:

3rd Ann. Rep. R. S., 54-5,

wherein it appears that two Arizona men, B. A. Fowler and Judge Joseph H. Kibbey, together with George H. Maxwell, were the founders of the Salt River Valley, Arizona, Water Users' Association, the first, and the model, for all other Water Users' Associations. Sometime after the organization of the Salt River Association, and prior to May 28, 1904, there was issued out of the Government Phinting Office, under the auspices of the U. S. Geological Survey, and the Reclamation Service thereof, a pamphlet referred to in the Record, page 207, as plaintiffs' "Exhibit 54," designated "Organization of WATER USERS' ASSOCIATIONS" in which is set forth in appendices, sample form of the Articles of Incorporation, to be adopted by other associations, following the Salt River plan, and a suggested form of contract, also following Salt River plan, to be entered into between the associations and the Secretary of the Interior, which is substantially the contract that is in controversy here; and from the body of the pamphlet we select the following paragraphs:

"1. The organization of a water users' association under each project should be undertaken as soon as the engineering examinations and surveys have proceeded to the point where the feasibility of the project from a physical standpoint is assured. The preliminary steps should be taken by a committee of people who are prominent in the vicinity and who have the confidence of those residing under the proposed project. It is advisable that such committee be appointed by a general mass meeting of those interested in the development of the project.

(Division XXII, Subd. 2, Par. d.)

"3. It is important that all the provisions relating to the adjustment of water rights, the regulation and distribution of water, the appurtenance of the water to he land, and the lien for the CHARGES ON ACCOUNT OF CONSTRUCTION SHOULD BE LEFT WITHOUT CHANGE.

"8. During this formative stage full publicity should be given to the various important features decided upon and also to the general form of articles of incorporation and by-laws promulgated by this office, inasmuch as deviations from this will be only in matters of detail and such as will not form the subject of serious controversy.

"9. By the time the articles and by-laws have been put in final form, the people generally will have been educated to a thorough understanding of the conditions by the local press and ALSO BY MASS MEETINGS HELD FROM TIME TO TIME FOR GENERAL DISCUSSION. The committee can then file the articles of incorporation with the appropriate State officer.

"10. After the articles have been filed, ONE OR MORE MASS MEETINGS should be called AS MAY BE NECESSARY, to BRING TOGETHER ALL THE PEOPLE INTERESTED. At these meetings the articles and by-laws should be fully discussed and subscriptions to the stock obtained from those present. Before construction can be undertaken it is necessary to obtain a sufficient number of subscriptions for lands in private ownership to assure the financial success of the project. Subscription blanks (see Article I of by-laws, Appendix A) should be printed and ready for use at such meetings.

"17. The matter of recording the subscriptions to stock is also one of considerable importance, because if not recorded the transfer of any tract for which a subscription has been made will not carry with it the

conditions of the subscription, and it would become necessary to obtain a new subscription from the purchaser."

The printing and circulation of the pamphlet such as our "Exhibit 15" (R. 213-228), did not seem to be contemplated by Mr. Wolcott, the Director of the U. S. Geological Survey, when he prepared and issue the foregoing pamphlet; and so far as we are advised, or gather from the Reclamation Service Reports, and the evidence in the Payette-Boise case and from what we know about the Salt River Project, the Yuma Project was the ONLY one in which the pamphlet plan was used; and the ONLY one in which it appears that the Secretary of the Interior made a definite estimate of the cost over his own individual signature, as is shown by plaintiffs' "Exhibit 4" (R. 201); and made a part of the pamphlet (R. 226).

e. That mass meetings were held, following the directions of the Director of the U. S. Geological Survey, appears, undisputed, from the testimony of OSCAR P. BONDESSON (Rec. 238), where it appears that there was practically a mass meeting in consultation with the Board of Consulting Engineers at Yuma, Arizona, on April 8, 1904 (R. 239-40), also that there was a mass meeting at Tule Laguna, on May 2, 1904, at which there was present practically all of the landowners, it having been "well advertised, and it was a living issue at that time as to which way we should go;" and at (pp. 263-4-5 Rec.), where it appears that the important mass meeting of May 28, 1904, was held in the evening of Elks Hall, on Main street, in Yuma,

which "had been called because it was very important —we were about to decide whether or not we wanted government irrigation and on what terms we could get it" (Rec. 264). "The landowners were in Yuma for the reason there had been a mass meeting called for that evening as it had been advertised extensively over the entire projct" (Rec. 263): And by the testimony of Fred L. Ingraham (R. 324), that he was present at the public meeting of April 8, 1904, before the Board of Consulting Engineers, and at the mass meeting called for May 28, 1904, "to advertise which there were handbills circulated and the usual means of advertising meetings of that kind from information of mouth to ear, which, in my judgment, and as events proved, was very effective; practically every family in the valley—every land holder was represented by somebody of mature age capable of considering the facts presented" (Rec. 325) "The meeting was held at Elks' Hall, Yuma, Arizona, on the evening of May 28, 1904. I was present. As I said practically every family that was interested in a tract of land in the Yuma Valley was represented by some person capable of considering the matter submitted at that meeting (R. 327). It was considered a very important meeting. It also included the owners of the land in the Gila Valley." And to the same effect is the testimonies of Lyon (R 336), Cloyd (R. 343) and Greer (R. 352). And the same testimonies at pages 238-9; 265-6-7-8; 324, 328-9-30-31-32; 339-40-41-42; 345-6-7; and 353-4, of the Record show that practically all the things required to be in a Public Notice, except the limit of area per entry, were fully discussed.

(Division XXII, Subd. 2, Par. f.)

f. We should next consider the pamphlet, plaintiffs' "Exhibit 15" (R 213-228), and its contents. Among many other things it contains (R. 214) an earnest request by the Water Users that the people be furnished a statement "of the character and cost of the proposed irrigation works." Also an estimate (R. 217-218) that there would be on the California side of the Colorado River 16,000 acres, and on the Arizona side 91,000 acres, and on both sides of the river there would be a total of 86,700 acres of irrigable land, of which 73,000 acres are in Arizona, which is further exemplified by the plat at page 228 Record; that there is an estimate (Rec. 224) that the entire cost of the project will amount to about $35 per acre; and (R. 225) that the Secretary has set aside $3,000,000 from the Reclamation Fund for the construction of the project; and (Rec. 225) a statement that the price will range near $35 per acre, to be paid for in ten annual installments after the first delivery of water, and finally the statement over the Secretary's own signature, under date of May 10, 1904, that the project, covering 85,000 acres of land could be reclaimed at a cost of less than $40 per acre, and setting aside the sum of $3,000,000 from the Reclamation fund for the construction of the Yuma Project (Rec. 226-7). The pamphlet itself, as will be seen therefrom, contains all the things required for the Public Notice by Sec. 4 of the Reclamation Act, except the limit of area per entry; that is, Sec. 4 requires that the Public Notice should contain five things, and this pamphlet contains four thereof, to-wit: (1) The lands irrigable under the project; (2) the charges per acre; (3) the number

of annual installments and (4) the time when they should commence. At this point we should consider that there was everything in the notice in which 92 per cent of all the land owners were interested, and that is, the private landowners were not concerned in the limit of area per entry.

g. The use made of the pamphlet, plaintiffs' "Exhibit 15," as a medium of conveying notice to the landowners and settlers within the Yuma Project was much more effective, we contend, than any mere publication of a Public Notice in a newspaper. At the request of the Supervising Engineer (R. 255), owing to a delay incident to having the printing done in the Government Printing Office, at Washington, D. C., this pamphlet was printed by the Water Users' Assocation in Los Angeles, California, to the extent of a thousand copies (R. 307 and 312); and as appears from the testimony of Bondesson (R. 263), and secured from the express office about noon, May 28, 1904, for the purpose of distributing it to the landowners generally, who were practically all in town that day, and "I was requested and directed by Mr. Newell, or Mr. Lippincott, to distribute it to the landowners, Rec. 264:—We had advertised in the papers the fact that they (the Reclamation Engineers) were coming, and distributed handbills to that effect, with the result that practically EVERY LANDOWNER IN THE ENTIRE DISTRICT WAS IN TOWN ON THAT DAY," and it was to these landowners that I distributed numbers of these pamphlets, and in which I was assisted by my partner, and practically every officer of the Association "* * * I personally knew all of the

landowners and I handed this pamphlet to the landowners. Rec. 265:—It was distributed or handed to those people who came to the meeting late who had not received a copy of it during the day. The landowners were practically all there at the meeting. It was the largest hall in town—all public meetings of that character were then held in that hall. Rec. 269:—Subsequent to the meeting the pamphlet was used for the purpose of convincing anyone who came to sign as a basis of negotiation, and if anyone wrote concerning the project they would mail them this pamphlet; a number of people were slow to sign and we had to send committees to their homes, and those committees invariably carried several copies of the pamphlet with them to be used for the purpose of study, so that they might know how intelligently to proceed about signing up. Later it was reprinted, and it was used by the real estate agents for advertising purposes. Rec. 270:—On the morning of the day that the pamphlet arrived the Supervising Engineer delivered to the Association a larger colored map, which is an enlargement of the map (Rec. 228.), that was made part of the pamphlet, and that larger map is in evidence as plaintiffs' "Exhibit 26" (not incorporated in the Record because of its size, but transmitted to this Court for examination by stipulation of the parties (Rec. 625). This map was used in connection with the pamphlet for the same purposes, as far as it went (Rec. 271). Later (Rec. 279) the map and the pamphlet were used for the purpose of inducing new settlers to purchase land within the project. To the same effect is the testimony of Judge Ingraham (Rec.

325) that the pamphlet was delivered to practically every land holder in the valley on the day of the meeting (May 28, 1904), and the distribution was continued after that meeting for a considerable time (Rec. 326), and was used in securing signatures and to explain to persons who might desire to purchase lands in the Yuma Valley the relations existing between the government and the Water Users' Association (Rec. 327). It was distributed to the landowners attending the mass meeting on the evening of May 28, 1904. To the same effect is the testimony of LYON (Rec. 339), and GREER (Rec. 352); and by means of the pamphlet DONOVAN (Rec. 349) was induced to purchase land within the Yuma Project; and in turn induced many others to purchase land in the same project. All that testimony is absolutely uncontradicted, as well as the following from BONDESSON (Rec. 307): "The pamphlet was distributed at the suggestion of Mr. Lippincott (the Supervising Engineer), and he had it printed for that purpose, the Association paying for it on his suggestion." There was no explicit mention of this pamphlet as a Public Notice under Sec. 4 of the Reclamation Act, but WE CERTAINLY TOOK IT TO BE THAT. And so the good work went on "until 98 per cent of the private landowners had signed up, and until about 98 per cent, all told, of the lands within the project were subject to the water charges;" (Bondesson—Rec. 276); also

3rd Ann. Rep. R. S. 198.

h. And in addition to all that the contract of May 31, 1906, annexed to plaintiffs' complaint, as "Exhibit

C" (Rec. 41), was submitted to the voters of the Association some time before its execution, and subsequent to May, 1904 (Rec. 317-18). It must be remembered that the homesteaders were constituent members of the Association, and had votes upon the question of the approval of that contract, he same as private landowners. See

Articles of Incorporation—Rec. 146.

i. Thus it appears, without contradiction, that absolutely every landowner within the Yuma Project, had directly brought to his attention in the most solemn manner, with the greatest publicity, everything of which the Secretary was required to give Public Notice of by the provisions of Sec. 4, except as to one feature, the limit of area per entry. In other words 92 per cent of the landowners had public and solemn notice of everything that they were interested in; and the other 8 per cent had notice of four-fifths of the things that they were interested in. And we now ask for whose benefit and knowledge was this Public Notice required to be given? For the use and benefit of the Secretary of the Interior? No, for he was the depository of the information, and he needed no notice, as he was the fountain head of the knowledge; and had judicial notice of everything. A notice was required to be given for the use and benefit of the settler, as pointed out by Mr. Mondell in his speech on the 12th of June, 1902, page 103 supra; and by Judge Deitrich, in his decision on July 19, 1919:

Payette-Boise vs. Cole,
263 Fed. reading at 738,

so that prospective settlers may determine for themselves whether they will, or will not settle upon the lands, and thus bind themselves to pay the published price for water. Therefore the plaintiffs here might very well waive the issuance of a Public Notice; and we did waive it, if it was not issued and published during the year 1904 (as we contend it actually was, as heretofore shown), by signing up and mortgaging our lands to secure the estimated cost of the project.

j. It is to be noticed that Sec. 4 of the Act does not require a written notice to be printed and published in a newspaper; but simply provides that the Secretary shall GIVE public notice of the specified things. We insist that the Secretary in 1904 did GIVE Public Notice of all the things required by the Act, except one. The Secretary might very well, under Sec. 10 of the Reclamation Act, have prescribed rules for the time, manner and form of giving the Public Notice required by Sec. 4. But he neglected to do so preferring to await developments as shown by the following:

> "Rules and Regulations.—Section 10 gives general authority to the Secretary to perform necessary acts and make essential regulations, the regulations being promulgated from time to time, as occasion requires, in order that they may be adapted to conditions found in actual practice. The law leaves executive discretion a wide range, and it has not been considered desirable to attempt to anticipate the conditions which might arise, but rather to meet them as they come and to promulgate rules and regulations on the basis of experience."
>
> 3rd Ann. Rep. R. S. 32.

(Division XXII, Subd. 2, Par. k.)

There is an attempt at page 30 of the 4th Ann. Rep. R. S. to show that there is a rule prescribed in 33rd L. D. 191 for the giving of the Public Notice described by Sec. 4. But reference to that volume of the Land Decisions shows that there is no rule promulgated there, and nothing whatever but the Public Notice for the Truckee-Carson Project. It is not a general rule and could have no application to the other projects. Incidentally that was the first Public Notice issued under the Reclamation Act, and it was dated August 18, 1904, and no other Public Notice appears to have been issued until the year 1907.

k. If it should be urged that the figures as to the cost per acre in the pamphlet, plaintiffs' "Exhibit 15," and the Secretary's letter of May 10, 1904, plaintiffs' "Exhibit 4," are too indefinite to constitute a Public Notice as to the cost of the project, that is not plaintiffs' fault; and that, as heretofore pointed out, in no event, no matter what the Public Notice contains, are we required under the law to pay more than the estimated cost. Furthermore, the estimated cost upon which the Public Notice was issued for the Truckee-Carson Project;

33 L. D. 190,

was less definite and certain than the estimated cost of the Yuma Project, for on page 51 of the 3rd Ann. Rep. R. S., where the cost of the Yuma Project is definitely fixed at $40 per acre, the following appears concerning the Truckee-Carson Project:

"The Truckee Project, now under construction, will reclaim upward of 150,000 acres at a cost of

ABOUT $26 per acre."

And in 33 L. D. 159, the Secretary in his instructions to the Commissioner of the General Land Office to issue the notice used this language:

> "You will cause notice to be given that the.... charges which shall be made per acre upon entries of the said lands are ESTIMATED TO BE $26 per acre," etc.

l. If it should be objected that the pamphlet was not signed by the Secretary of the Interior, we urge, first, that at least a portion of it was, that is his letter of May 10, 1904, at the foot of the pamphlet (Rec. 226-7); and, second, that all of the annual reports of the Reclamation Service to Congress are signed by the Secretary of the Interior. But in the case of the Public Notice for the Truckee-Carson Project, it was not signed by the Secretary of the Interior, but by the Acting Commissioner of the General Land Office.

Our notice of 1904 was signed by the Chief Engineer, and as to his authority see par. d, subd. 3, Div. XXIII of this Argument, p. 172 infra. He was, practically, the Secretary.

m. And finally, according to the uncontradicted evidence, the pamphlet was actually treated as the Public Notice under Sec. 4 of the Reclamation Act, according to the uncontradicted testimony of our principal witness:

> "There were printed of the first issue of those pamphlets, one thousand. Then it was reprinted as many as two times by the Association, while I was president, and I don't know whether it has been reprinted since or not. I am inclined to think it has

not. It was the custom of either myself or the secretary to hand this pamphlet to various individuals that came and inquired about lands and I referred to it then in general terms as the public notice under section 4 of the Reclamation Act. I told them in effect that it was a public notice under Section 4 of the Reclamation Act. By that I mean that that was exactly what we had expected under that Section 4. That is what we had to go on, and that is what we would have to pay and that is what we relied on." (Rec. 310.)

Therefore we insist that, within the letter and the spirit of the law, a Public Notice was actually given in the year 1904, as required by Section 4 of the Reclamation Act.

3.

## EQUITY WILL PRESUME PUBLIC NOTICE TO HAVE BEEN GIVEN IN 1904.

Should it be held that a Public Notice was necessary in order to fix and determine the charges per acre of the Yuma Project, and should it be further held that such Public Notice was not actually given as we have set forth in the preceding subdivision, we respectfully contend that equity will presume that such notice was actually given by the Secretary of the Interior in the year 1904, for

> "Equity regards that as done which ought to be done; and it looks to the intent rather than the form."
>
> Pomeroy's Eq. Jur. Sec. 363, 3rd Ed.

a. Section 4 provides that upon the determination by the Secretary that any irrigation project is practicable, he MAY let contracts, etc., and THEREUPON he shall

give public notice of the lands irrigable, etc.; also, of the charges which shall be made per acre upon the lands, etc., together with the number of installments, etc,. and that said charges shall be determined with a view of returning to the Reclamation Fund the ESTIMATED COST OF THE CONSTRUCTION OF THE PROJECT, etc. There can be no doubt that the Secretary did, on May 10, 1904, determine the Yuma Project to be practicable. The defendants having their own meaning for "estimated cost" and contending that "thereupon" means thirteen years afterwards, it may be well to consider the real meaning of the word "thereupon." There can be no doubt where it is used as an adverb of time as in Sec. 4, that it must mean at once, without delay, and in support of that view we cite the following authorities:

Webster's New International:

"3. Immediately after that; at once; without delay."

Also the following cases:

State vs. Van Wyke, 54 Pac. 768,
Kaufman vs. Drefel, 76 N. W. 559,
Mansur vs. Co. Commis. 22 Atl. 358,
State vs. DeLea, 93 Pac. 814.

Whether the Secretary might delay the giving of the Public Notice until after the letting of the contracts may be a debatable question. We are inclined to think that the statute means that he shall immediately upon the determination give the Public Notice. However, in this case he did let contracts for the building of the Laguna Dam on June 5, 1905,

4th Ann. Rep. R. S. 98-100,

and for twelve miles of dikes on August 17, 1905, Ibid., 100; and on the last named date it became the duty of the Secretary of the Interior to give the Public Notice. And to show the contemporaneous construction placed upon the Act by the Secretary, we quote the following from:

1st Ann. Rep. R. S. 64:

"As soon as possible after such withdrawal, engineers are instructed to make the survey of the lands and of the proposed canals and reservoirs; also to conduct necessary engineering investigations concerning the water supply and the conditions under which the construction will be carried on. Upon the completion of this work the results are to be summarized and submitted to the Secretary of the Interior, with such recommendations as may be deemed advisable by the Director of the Geological Survey, together with maps, plans, and estimates of cost.

"It will then be the duty of the Secretary of the Interior to determine whether or not such project is practicable and advisable. If determined to be impracticable or inadvisable, he will restore to the public domain the lands withdrawn, and they will become subject to the public land laws, as if such withdrawal had never been made. If the project is approved by the Secretary of the Interior, he may cause contracts to be let for the construction of the proposed works, either as a whole or for such portion or section as will constitute a complete system, if it should be deemed best not to undertake the entire project at that time. He will THEREUPON give public notice of the land which may be reclaimed thereunder, and of the particular limitations contemplated by the law as to area, cost, number of installments, date of payments, etc."

And again in 33rd L. D. 158, in the Secretary's instructions to the Commissioner of the General Land Office to issue the Public Notice for the Truckee-Carson Projec, we find the following:

> "A CONTRACT HAVING BEEN ENTERED INTO for the construction of the irrigation works known as the Truckee-Carson Project in Nevada, IT BECOMES THE DUTY of the Secretary of the Interior under Section 4 of the Act of June 17, 1902 (32 Stat. 388), to give public notice, etc."

Therefore we find that from the plain terms of the statute, and the "natural, plain, obvious and ordinary signication" of the word "thereupon" and the contemporaneous construction of Sec. 4 by the Secretary, whose duty it was to enforce it, that, at the very latest in August, 1905, it became the duty of the Secretary to issue the Public Notice for the Yuma Project required by Sec. 4. It does not affirmatively appear from the evidence in this case that he did not so perform his duty. Therefore we say:

> "It is a presumption of law, until the contrary appears, that officers have done their duty."
>
> 29 Cyc. 1437,
> 1 L. D. 223;
> State of Louisiana, 5 L. D. 514.

b. There is another principle of law and equity peculiarly applicable to the Secretary of the Interior; and very frequently referred to and acted upon by that officer in his administration of the public land laws; that is, "where an individual in the prosecution of a right does everything which the law requires him to do, and fails to attain his right by the misconduct or NEGLECT

of a public officer, the law will protect him, and his rights will not be impaired because of the officer's negligence."

Pomeroy vs. Wright, 2 L. D. 166, and other cases cited in
3 L. D. 42; 4 L. D. 466 and 515,
5 L. D. 233 and 646; 6 L. D. 147,
20 L. D. 535, and numerous others.

Most of these cases deal with neglect of the local officers, but that does not detract from the principle, which is enunciated by the highest authority.

Lytle vs. Arkansas, 9 How. 314.
Railroad Co. vs. Smith, 9 Wall. 95.
Van Wyck vs. Kneval, 106 U. S. 367.

The doctrine laid down in Lytle vs. Arkansas, supra, has been approved so many, many times by this Court. and other Courts of last resort, that space and time forbids their citation.

See 4 Rose's Notes, 203, Rev. Ed.

If it can be conceived, or if it be seriously contended, that a public notice was necessary in 1904 to fix and determine the estimated cost of construction of the Yuma Project and the charges which should be made per acre therefore; and when it is considered what was actually done in the way of bringing notice home to those interested; and when it is considered that we did everything that we were reqnired, or asked, to do, by "mortgaging our lands to secure the repayment of the estimated cost of construction;" and when it is further considered that it does NOT affirmatively appear that Public Notice was NOT given; must it not, we ask, be

conclusively presumed that the Secretary of the Interior did his duty in the years 1904 and 1905; and that he is estopped in 1917 to deprive us of our vested rights to have the project constructed for the estimated cost, by a new and improvident public notice; and should not the Secretary be estopped directly, or through his employes, to assert that for 13 years he had been, in effect, unlawfully expending public moneys?

c. And there is yet another principle that may be invoked. No one can take advantage of his own wrong or neglect. It was the duty of the Secretary to give the Public Notice, required by Sec. 4, for the Yuma Project, not later than August, 1905. If he had done so, and he had fixed the charges per acre at any sum less than $40 per acre; and if he had then issued the Public Notice he must have, and would have, fixed the charges at the amount of the estimated cost (as he did in the case of the Truckee-Carson Project, See 3rd Ann. Rep. 51; and 33 L. D. 158), some sum less than $40 per acre. If he had then so fixed the charges per acre they would have been binding and conclusive upon everyone. (We challenge plausible dissent from proposition.) The Secretary neglected to perform his plain duty for 12 years; and can he now, because of so neglecting his duty, levy a charge upon our lands of twice the amount he could have levied upon them in 1905? We respectfully urge that the answer must be, NO.

(Division XXIII, Subd. 1, Par. a.)

## XXIII.

## PLAINTIFFS DID NOT WAIVE THEIR LEGAL AND EQUITABLE RIGHTS BY THE CONTRACT OF MAY 31, 1906.

In our 23rd ground of the First Specification of Error we attack the holding of the Trial Court (Rec. 560-2), to the effect that the terms of the contract entered into between the Secretary and the corporate plaintiff on May 31, 1906, plaintiffs' "Exhibit C" (Rec. 41-8), are clear and understandable and must be held to express the intention of the parties, and to be binding upon the plaintiffs to the extent of $75.00 per acre. That is, if we understand the holding of the Lower Courts and the contention of the defendants, the plaintiffs entered into a contract that compels us to pay any sum whatsoever that the Secretary might at any time choose to set forth in a Public Notice as the charges against the land, no matter what Congress really intended, and no matter how it expressed itself; and even though we may be right as to our contention as to the meaning of the words "estimated cost" and "thereupon," that we are estopped by our own contract to say that we shall not return into the Reclamation Fund such an amount of money as the Secretary may choose to apportion to our lands. In opposition to that we offer the following.

### 1.

### THE SECRETARY SHALL APPORTION ONLY THE "ESTIMATED COST."

(a) For the convenience of the Court we here set forth the immediately important portion of Sec. 5 of the

contract in question as the same appears at p. 45 of the Record:

"5. The said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the cost of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders, and promptly pay," etc."

b. We believe it to be worthy of note that that provision of the contract of May 31, 1906, and in fact the whole contract, is almost a duplicate of the sample form of contract set forth in the pamphlet on "Organization of Water Users' Associations" issued by the Director of the U. S. Geological Survey sometime prior to May, 1904, in Appendix B, pp. 26 to 28 thereof, as will be seen from the following portions of Secs. 4 and 5 taken from said Appendix:

"4. That the payments for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ten equal annual payments, the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

"That the said Water Users' Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and

will promptly levy calls or assessments therefor and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay, etc."

See also Salt River contract, Sec. 4 and 5 thereof, 3rd Ann. Rep. R. S., 131.

It was contemplated that that contract should have been entered into before any work was begun, as appears from Par. 24 of that pamphlet:

"After the subscription books of the association have been closed, preparations must be made for the execution of the contract between the Water Users' Association and the Secretary of the Interior. The form of this contract is printed as Appendix B, and can be adapted to any project with very few changes. This contract must be entered into before construction will be begun."

Which we believe is significant, and bears out Mr. Bondesson's testimony (Rec. 317) to the effect that the contract was prepared in 1904 in the form in which it was finally executed, but there had been delay, etc.; and also in accordance with the admonition of Par. 26 of the same pamphlet, which states:

"No changes should be made, as they might involve the refusal on the part of the Secretary to execute the same," etc.

All of which we deem important in considering this contract.

c. The vital portion of the contract, here to be considered, is that portion of Par. 5 thereof whereby the corporate plaintiff

"agrees that it will promptly collect, etc., and hereby guarantees the payment for that PART of the cost of the irrigation works which shall be apportioned by

the Secretary of the Interior to its shareholders."

It was contended below, and the Trial Court has found that that language is unambiguous and conclusive; and that, in effect, it means that we are bound to pay the $75 per acre, or any other charge that the Secretary of the Interior might have chosen to levy upon our lands. If it should be the law that the Secretary may levy any arbitrary amount, then we presume the language is unambiguous and conclusive. But first let us see if it is unambiguous on its face. The plaintiff corporation is to collect, etc., "that part of the cost * * * apportioned by the Secretary." What PART? We look in vain to other portions of the written instrument for an express, or implied, declaration as to what PART of the cost is to be collected and guaranteed. It will hardly do to say that it is just such portion of the cost as the Secretary of the Interior should arbitrarily and of his own sweet will determine should be paid back. Not at all, for if the government ox should be gored by some misguided, corrupt, or over sympathetic Secretary of the Interior determining that the Yuma Project should return only $1.00 per acre, when the actual cost might be $100.00 per acre, there would be loud, prolonged and successful protest against that sort of inequitable nonsense. The Public Notice containing a charge of a dollar per acre would not last long. That is self-evident. Or, to go to the other extreme, assuming that the entire Yuma Project as now outlined by the Secretary, including the Bard, California, Unit, the Lower Colorado Irrigation District (see Sec. 3, Article IV, Articles of Incorporation, Rec. 145, and Art. IV of the Amendments thereto, Rec. 161, Pltffs' Ex. 1), the only portion of the

project involved in this suit, and the 40,000 acre Mesa Unit, were completed at a cost of $20,000,000, and the Secretary should have chosen to apportion it all to the Lower Colorado District, would such an apportionment stand? We think not, because the charges would not be "apportioned equitably" in accordance with Sec. 4 of the Reclamation Act. But, according to appellees, we must not look to the law for help in construing the contract; for, of course, if we go to reading in "apportioned equitably" it is inevitable that some Water Users who "mortgaged his land" eighteen years ago to secure the repayment of the "ESTIMATED COST OF CONSTRUCTION," will insist on having that phrase read into the contract also!

d. But we need not "read" it in; it is there already. The contract (Rec. 42) recites that the United States contemplates the construction of certain irrigation works under he provisions of the Reclamation Act, etc., approved June 17, 1902, and in paragraph 10 of the contract (Rec. 46) appears the following:

> "It is understood that in ALL the relations between the government and this Association and the members of the Association, the rights of the members of the Association are to be DEFINED, DETERMINED and ENJOYED by and under said Act of Congress."

Still leaving ourselves open to the imputation of unwarrantably assuming that this Court knows no law, we quote the following from Elliott on Contracts, Sec. 1514:

> "Effect must be given to all the provisions and parts of the contract where possible, and no part should be rejected unless absolutely repugnant to the

general intent. A single word or sentence should not be considered alone but should be considered with reference to the context."

Citing:

Amer. Bond vs. Pueblo Inv. Co., 80 C. C. A. 97,

and numerous other Federal and State authorities.

We take it that one of the RIGHTS to be enjoyed by the plaintiffs in this case is to have, in accordance with Sec. 4 of the Reclamation Act, the charges per acre "determined with a view of returning to the Reclamation Fund the ESTIMATED COST of construction of the project," apportioned equitably. Therefore we respectfully contend that this case begins and ends with the contract itself, and that the PART OF THE COST which shall be apportioned by the Secretary of the Interior to the plaintiffs is the ESTIMATED COST of construction of the project, as provided by Sec. 4. And we submit, that almost the same point has been judicially determined in:

U. S. vs. Cantrall, 176 Fed. 949.

In that case, concerning the Klamath project, the United States sued Cantrall et al., water users, for certain unpaid O. and M. charges, under a written contract providing, among other things, that they would pay to the U. S. "the charges duly levied against such lands for the management and operation of the irrigation system." Judge Bean, of the U. S. District Court of Oregon, deciding the case, expressed himself as follows, reading at page 954:

"It does not follow, however, that the maintenance charges fixed by the Secretary of the Interior are conclusive as against the defendants. This action is

on an express contract entered into between them and the government. The liability and duty of both parties to the agreement are measured by the terms of the contract. By it the defendants agreed to pay to the United States the charges DULY levied against their lands for the purposes stated. This NECESSARILY means charges which the government is AUTHORIZED to COLLECT," etc.

In this case the government is authorized to collect only the ESTIMATED COST of the construction of the project, as determined by the Secretary of the Interior on May 10, 1904—less than $40 per acre, and no more.

2.

IF THE CONTRACT IS AMBIGUOUS OR DOUBTFUL, IT SHOULD BE CONSTRUED AS REQUIRING THE SECRETARY TO APPORTION THE ESTIMATED COST.

a. We insist that the contract is unambiguous from our standpoint, when read with Sec. 4 of the Reclamation Act, and that it requires the Secretary to apportion only the estimated cost; but if, on the other hand from the appellees' standpoint, it is apparently unambiguous it may be rendered ambiguous and open to construction if its language is doubtful so that it is susceptible of two constructions, one of which makes it a fair contract, such as prudent men would naturally execute, while the other makes it inequitable and such as reasonable men would not be likely to enter into; and that the interpretation which makes it a rational and probable agreement will be preferred to that which makes it an unfair or improbable contract:

Elliott on Contracts, Sec. 1510, citing:

(Division XXIII, Subd. 2, Par. b.)

Rope Co. vs. Min. etc. Co., 97 C. C. A. 465,
Pressed Steel Car Co. vs. Eastern R. Co., 57 C. C. A. 635,
Amer. Bond. Co. vs. Pueblo Invest. Co., 80 C. C. A. 97,
Coghlan vs. Stetson, 19 Fed. 727, and numerous State authorities.

b. Certainly the language of the contract, to the effect that the plaintiffs agree to pay such part of the cost as the Secretary should apportion, standing alone, is susceptible of two constructions, one of which would be that we agreed to pay any charge that the Secretary might choose to levy, and the other is that we only agreed to pay such part as Sec. 4 of the Reclamation Act provides that we shall pay—the estimated cost of the construction of the project. We contend that the contract, as construed by the Lower Courts, is not such a contract as reasonably prudent men would be likely to enter into, and not a rational and probable agreement, but on the contrary is unfair and improbable. As pointed out by the witness Fred L. Ingraham (who is himself a jurist—Rec. 321), speaking of the mortgage, or lien, executed by the Water Users upon their lands (plaintiffs' Exhibits 14 and 27, Rec. 209 and 274), at page 333 Rec., "If there were no estimated or limited cost which we agreed to pay, then the execution of this lien amounted on the part of the landowners to a gift of their pocketbooks, saying 'Take this and do as you will with it.' That is the way I viewed it at the time, and that is the way I ADVISED OTHER PEOPLE, and Judge Kibbey coincided with my views, and sent his

OPINION to the same effect to the Water Users' Association."

c. Mark that the uncontradicted evidence shows our attorneys advised us, in effect, that Sec. 4 was part of the contract, and that there was a limit to the amount that the Secretary could apportion to our lands—the estimated cost, only. But also mark that we are caught between two fires by the holding of the Trial Court (Rec. 561) in its opinion. "No claim can be made that they were ignorant, or unacquainted with business methods, or contractual relations. It must be assumed that they read the contract, and fully understood its every provision; and if not their own counsel was there to ADVISE them, etc." Yes, our COUNSEL were there to advise us, one of them being Judge Joseph H. Kibbey, second to none, perhaps superior to all, in his profound learning in irrigation law, and the very father, founder, and architect, of the whole vast plan and structure of Water Users' Associations, and this very contract:

2nd Ann. Rep. R. S. 31,

3rd Ann. Rep. R. S. 55, and

Pamphlet on Organization of W. Users' Ass'n.

And Judge Kibbey (who was practically selected for us as our counsel by the Supervising Engineer; see Pltffs' Ex.'s 20 and 22, Rec. 250 and 257), with all his learning and ability, the very fountain-head of knowledge in the matter, 16 years before the rendering of the appealed-from decision, and while yet the Secretary was officially promulgated to the world the wisdom and advantages of that provision of the law which requires the estimated cost, only, to be returned to the Reclamation

Fund (2nd Ann. Rep. 30, 3rd Ann. Rep. 31, 4th Ann. Rep. 22) advised us that the contract limits the amount that the Secretary can apportion to our lands to the estimated cost. And yet it is contended, and held, that it is clear, plain and positive that the contract means diametrically the opposite! And, we ask, how could Judge Kibbey possibly advise us other than that the Secretary was limited in the amount which he should assess against our lands to the estimated cost, as determined by him in May, 1904. The Judge had drafted a contract for our Water Users' Association, and all Water Users' associations, providing (Rec. 46-7) that in ALL the relations between the government and the Association, and the members of the Association, the rights of the members are to be defined, determined and enjoyed by and under the provisions of the Reclamation Act; which by its express terms provides that the charges shall be determined with a view of returning to the Reclamation Fund the estimated cost of construction.

d. The lien referred to by Judge Ingraham (Rec. 209) is really part of the contract here for construction. The Articles of Incorporation of the Association is made part of the contract (Rec. 41); and the same articles are made part of the lien with the same force and effect as though the articles were a part thereof (Rec. 209); so therefore there are really three separate instruments constituting the contract here to be considered. We do not deem it at all probable that any rational set of men would enter into an agreement giving to a single man on the other side of the pact the right to fix the price to be paid for the work to be done. Cer-

tainly no rational human being would, under the not-unlike circumstances, enter into a contract with, say a building and loan association, for the construction of a dwelling house upon his lot giving the building and loan association a lien to guarantee the payment of the cost, and then leave it to the mortgagee to determine how much it should collect from the house and lot when it got ready to make the apportionment. Any man, or set of men, that would enter into such a contract with a private corporation would be instantly dubbed insane by rational, thinking people, and yet it is seriously urged by the appellees in this case, in spite of the specific promises that were made to them by the engineers, and the glowing and confident statements in the Pamphlet (Rec. 225), that an effort had been made "to cover all contingencies, and the estimate of cost had been liberal," and that the price would "range near $35 per acre;" and the solemn and official statement of the Secretary (Rec. 226) that their lands could be reclaimed "at a cost of less than $40 per acre," and that "$3,000,000, or so much thereof as may be necessary," had been set aside for their reclamation, all in response to their request that they be furnished with a statement of the cost per acre to the land (Rec. 214 and 249), that the landowners and settlers within the Yuma Project in 1904 entered into just such an irrational and improbable contract as the supposed one with the building and loan association, and did, in effect, say to the Secretary, "Take our pocketbook, and do as you will with it, and we give you a mortgage on our homes to secure any amount you choose to charge.

(Division XXIII, Subd. 2, Par. f.)

e. We point out, if there should now be any doubt as to how the contract should be construed, that this is the government's contract, that the language is the government's language; and, as shown above (Par. b of the preceding subd. 1), that Sec. 5 of the contract is practically a duplicate of Par. 5 of the prepared form of contract for all projects, as shown in Appendix B of the pamphlet for the "Organization of Water Users' Associations (referred to in the Rec. 209 as plaintiffs "Exhibit 54"), and

> "That when there exists an uncertainty or ambiguity as to the meaning of the terms of an agreement and the language may be attributed to one of the parties thereto, it will be considered most strongly against the party using the language thereof * * * When a contract is entered into and generally used by one of the parties, and doubt arises as to the true meaning of such form, it shall be construed most strongly against the party preparing it."
>
> Elliott on Contracts, Sec. 1528—citing:
>
> Noonan vs. Bradley, 9 Wall. 394,
>
> Amer. Sur. Co. vs. Pauly, 170 U. S. 160;

Also see:

Bank vs. Hart, Ins. Co., 95 U. S. 673,

T. P. R. Co. vs. Reiss, 183 U. S. 621,

Garrison vs. U. S., 7 Wall. 688.

f. And if it should be urged that this is a contract made with the United States of America, and that it is dealing with the public's money, and is therefore not bound by the same rules of law as apply to insurance and railroad companies, the answer to that is, that this contract does not involve a grant of public land or a public franchise, but is an ordinary commercial con-

tract based upon an adequate consideration, and is not subject to the rules governing the grant by the government to private persons of property rights or franchises in which the whole public is interested. See

Garrison vs. U. S., 7 Wall. 688,
Langdon vs. New York, 93 N. Y. 129,
Dermott vs. State, 99 N. Y. 101; 1 N. E. 242.

In other words:

"The rules governing the construction and operation of contracts generally apply to contracts entered into by the United States and the United States, when they contract with their citizens, are conrolled by the same laws that govern their citizens in that behalf, and the obligations which would be implied against citizens under the same circumstances will be implied against them."

39 Cyc. 742—Notes 4, 5 and 6,

citing a multitude of decisions of this Court.

And in the construction of irrigation works under the Reclamation Act the United States is not exercising a government or a public function, but is promoting its proprietary interests:

Twin Falls Canal Co. vs. Foote, 192 Fed. 583,
Stanfield vs. Umatilla W. Users' 192 Fed. 596

3.

IN VIEW OF THE ACTIONS OF THE SECRETARY, AND THE AUTHORITY OF THE CHIEF ENGINEER, THE PAMPHLET, PLTFFS' EX. 15, SHOULD BE READ INTO THE CONTRACT.

a. No doubt an effort will be made to show that in all the oral proceedings, as they may be called, hereinafter set forth, the Secretary was entirely without

knowledge as to any of the happenings, or the contents of the Pamphlet Pltffs' Ex. 15 and that it was all without his authority, and that nothing that was said or done by any of his subordinates could bind him or the United States. That, we believe, to be another stupendous fallacy, for it will not do for the Secretary of the Interior to take that position, when he has repeatedly over his official signature in his reports to Congress, under Sec. 2 of the Act, recommended and, in fact, required, the landowners to proceed in the way that we proceeded in the floating of the Yuma Project:

2nd Ann. Rep. R. S. 31-32, 46-47,
3rd Ann. Rep. R. S. 54-55.

He pointed out the Salt River Project method of proceeding as a model for all other projects, recognized the existence and potency of mass meetings, and finally, through the Director of the Geological Survey, caused to be issued the pamphlet on the Organization of Water Users' Associations, plaintiffs' "Ex. 54" (Rec. 208), voluminous excerpts from which appear in Par. d, Subd. 2, of Division XXII, of this Argument p. 39 supra, wherein methods of floating projects are recommended and required, which we followed.

b. In the very pamphlet under discussion, plaintiffs' "Exhibit 15" (Rec. 213-28) it is shown at page 213 that we addressed our communication of May 3, 1904, to "E A. Hitchcock, Secretary of the Interior, Washington, D. C." as was the petition of the governors of the Water Users' (Pltffs "Ex. 19," Rec. 248); and while the response (Rec. 215) seems to have come from the U. S. Geological Survey, yet the language is so framed.

in the third person, that it might as well have been written by the Secretary, as by the Chief Engineer, whose name is appended to it (Rec. 227). In any event the pamphlet is the answer to our petitions, under date of May 16, 1904, we find:

> "Your communication of May 3, 1904, accompanied by the petition under the same date, etc., is hereby acknowledged." (Rec. 215).

Evidently, as we shall show in Par. d below, the Secretary of the Interior must have delivered our petition to his proper subordinate officer for answer; and if the answer cannot be construed as the personal answer of the Secretary himself, it certainly must be conclusively presumed that the answer was written under his direction and by his authority. Therefore the Secretary of the Interior cannot, nor can the appellees as his employes, pretend to have no knowledge of what happened in the oral proceedings at Yuma, Arizona, on May 28, 1904, or to have no knowledge of the contents of the Pamphlet, Pltffs' Ex. 15, and cannot escape responsibility for what was said and done there by his representatives.

c. We believe it is hopeless to search for apt authorities on this point; as the whole proceedings were wholly without precedent; but we respectfully urge that if a private corporation, such, say as the Colorado Delta Canal Company, which was offering us the alternative proposition (as shown by plaintiffs' "Exhibit 17 and 18," Rec. 243 and 5); should through its Directors and Chief Engineer have done as the Secretary of the Interior did in this matter, there could not be much ques-

tion but that the corporation would be bound by what was said and done.

"Authority to do a particular act or make a particular contract need not be necessarily expressed, but may be inferred from the facts and circumstances of the particular case, as from a course of conduct or dealing by the corporation with its officers and agents and the public."

14a C. J. Sec. 2226, Corporations, Notes 17 and 18, citing:

Mahoney Min. Co. vs. Bank, 104 U. S. 192,

Martin vs. Webb, 110 U. S. 7,

Augusta Bank vs. Earl, 13 Pet. 519,

Hailey Bank vs. Min. Co., 36 C. C. A. 633,

and numerous other Federal and State authorities.

And as the United States, in operating under the Reclamation Act, is proceeding in its proprietary, and its governmental, capacity,

Twin Falls Canal Co. vs. Foote, 192 Fed. 583,

Stanfield vs. Umatilla Water Users, 192 Fed. 596,

we believe that the Secretary should be bound by the oral proceedings at Yuma, Arizona, on May 28, 1904, and the contents of the Pamphlet, Pltffs' Ex. 15, just as a private corporation or individual would have been.

d. But we can safely go further: Sec. 10 of the Act provides:

"That the Secretary of the Interior is hereby authorized to perform any and all acts and to make all such rules and regulations as may be necessary and proper for the purposes of carrying the provisions of this act into full force and effect."

In 1st Ann. Rep. R. S. 16, we find:

(Division XXIII, Subd. 3, Par. d.)

"The Reclamation Service, organized for the purpose of making surveys and examinations required by the law of June 17, 1902, and for putting into effect the various projects authorized by law, has been created by the Secretary of the Interior."
And in 2nd Ann. Rep. R. S. 41-42:

"The plans of operation under the reclamation law approved by the Secretary of the Interior on July 8, 1902, authorized the creation of what is known as the Reclamation Service, etc."

"The principal officer of the Reclamation Service is the Chief Engineer, etc."
And in

3rd Ann. Rep. R. S. 40-41,

under "Organization of the Reclamation Service," we find:

"The Chief Engineer and assistant chief engineer HAVE FULL CHARGE of ALL ENGINEERING and ADMINISTRATIVE MATTERS * * * the Chief Engineer giving particular attention to DEPARTMENTAL and related matters, etc."
And we find in

4th Ann. Rep. R. S. 21,

"Sec. 2 of the Act directs the Secretary of the Interior to make examinations and surveys and to construct irrigation works. In order to carry out these operations there has been gradually created what is known as the Reclamation Service, * * * Sec. 2 also directs that a report be made giving the results of examinations and surveys, estimates of cost, and all other facts relative to the practicability of each irrigation project. These matters of COST and PRACTICABILITY are FUNDAMENTAL, and great care is taken to check the preliminary ESTIMATES against the facts obtained by actual experience as the work progresses."

And we find the Chief Engineer entering into an important contract with the State of Nevada, through its State Engineer, on July 1, 1903, for the division of the cost of the surveys of the Truckee-Carson Project, which is set forth at length in

2nd Ann. Rep. R. S. 40.

His name is signed to each and every one of the Annual Reports to Congress from First to Fifth, at pages 14, 19, 23, 18 and 14, respectively; and thereafter, having been converted into the Director of the U. S. R. S., until the present time. There was no adverse action on any of these reports by Congress, and under the authority of

Swigart vs. Baker, 229 U. S. 187,

more fully referred to in Par. f, Div. XVIII, of this Argument, supra, may it not be said, that under the law, as construed by Congress, that the Chief Engineer was really, in truth and in fact, for all practical purposes; the administrative and executive officer of the United States for the purpose of putting the Reclamation Act into effect? He was the principal officer of the Reclamation Service, which was created for the purpose of putting the Act into effect, and had full charge of all administrative matters, giving particular attention o departmental matters. See

1 C. J., 1239-40,
17 Cyc. 1579,
Black's Law Dict.,
Bouvier's Law Dict. and
Webster's New Inter. Dict.,

for the definition of "administration" and "administrative," and that "the term is very comprehensive, having reference to the administration of government," and is synonymous with "executive." And when our witness Wm. H. Lyon (Rec. 340 and 343) testified that the Chief Engineer stated on May 28, 1904, that he represented the Secretary, or the Interior Department, he fell far short of the truth, as the Chief could very well have said "I AM the Secretary—the Interior Department," with as much truth as Louis XIV is said to have exclaimed, "L'etat, c'est moi!"

e. Therefore, we earnestly contend that the Chief Engineer had as much power and authority as the Secretary to write, issue, circulate and publish the Pamphlet, Pltffs' Ex. 15 (Rec. 213-28); and that he was infinitely better qualified and better informed than the aged Secretary to write and speak of the estimated cost of the project; and that in anything he wrote in the pamphlet, or said at the mass meeting of May 28, 1904, heretofore and hereinafter described, he was, in truth, and in fact, for all practical purpose, under the law, the Secretary; and, that consequently the pamphlet should be read into the contract.

f. Nor need we fear the effect of the reservations made by the chief in the pamphlet ( Rec. 216) and referred to in the Opinion (Rec. 553 and 564), for two reasons, at least. The Secretary himself was not stripped of his powers because of the catholic power vested in the Chief Engineer; and the Secretary's estimate of less than $40.00 per acre was ample margin to take care of all fair and reasonable changes in plans and estimates

contemplated from any fair and reasonable interpretation of the reservation; and the law itself is absolute that the charges shall be determined with a view of returning the estimated cost to the fund; and, as pointed out by the joint committee of Congress, Senate Doc. 719, page 68, supra, while some discrepancy might arise between the estimated and the actual cost, the wide difference between $35 per acre and $75 per acre is UNJUSTIFIABLE.

4.

THE PRELIMINARY NEGOTIATIONS, SURROUNDING CIRCUMSTANCES, AND INTENT OF THE PARTIES.

Still contending that the contract, from our standpoint, and when construed with Sec. 4, and has had read into the Pamphlet, Pltffs' Ex. 15, is unambiguous and means only the estimated cost of 1904 can be apportioned against our lands by the Secretary; but that if it is not construed with Sec. 4, and the pamphlet, it is clearly ambiguous and doubtful, we offer the following:

a. We take it to be fundamental, universal and incontrovertible law, that in construing an ambiguous contract, the intent of the parties and the surrounding circumstances will be considered; reason and equity will prevail; and the law under which it was made will be read into it.

"The primary rule in the construction of contracts is that the court MUST, if possible, ASCERTAIN and GIVE EFFECT to the mutual intention of the parties. * * * Greater regard is to be had to the clear intent of the parties than to any particular

words which they may have used in the expression of their intent."

13 C. J. 521, Sec. 842.

citing a wealth of Federal and other authority in notes 18 and 20.

And that "contracts must be construed with reference to the intention of the parties at the time of entering into the contract."

Ibid, page 523, citing

Com. vs. West Va., 238 U. S. 202.

"The words of a contract will be given a reasonable construction, where that is posible, rather than an unreasonable one; and the Court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation which evolves the most reasonable and probable contract should be adopted."

13 C. J. 540, Sec. 511.

"The intention of the parties is the cardinal and paramount rule. All others are subordinate. The parties should be bound for what they intended to be bound for and no more. To hold anyone bound further, would be to impose upon him an obligation which he never assented to, or intended to take upon himself, and would be the height of injustice and oppression."

6 R. C. L. 835, Secs. 225-6.

The preliminary negotiations may be considered. Sec. 228 Ibid.

For reasonableness see Sec. 230 Ibid.

For surrounding circumstances see Sec. 239 Ibid.

To the same effect is

(Division XXIII, Subd. 4, Pars. b and c.)

Elliott on Contracts, Secs. 1508, 1517,1518,1519, and 1521.

b. In view of the fact that the contract, by its express terms, makes the Reclamation Act a part of it, it would seem unnecessary to cite authority in support of the proposition that the law is written into all contracts but in abundance of caution, and with apologies to the Court, we cite:

13 C. J. 560, Sec. 523,
6 R. C. L. 855, Sec. 243,
2 Elliott on Contracts, Sec. 1507.

c. We must first consider that at the coming of the Reclamation Service into the irrigation field at Yuma, Arizona, as a prospective competitor with the then existing, inefficient, but going concerns in the irrigation field, a newer and more formidable private competitor, Colorado Delta Canal Company, was actively and energetically pushing its scheme, advertised by an alluring prospectus of a much more elaborate and cheaper plan than that offered by the Reclamation Service; see

Plaintiffs' Exhibit 17, Rec. 243,

and was securing and executing contracts whereby it undertook to construct the larger project for $15.00 per acre. See Plaintiffs' Exhibit 18 (Rec. 245). That after grave and widespread discussion amongst the private landowners—all others being neglible—it was finally determined to enter into negotiations with the government, if a satisfactory price could be arrived at, and to refuse the offers of the Delta Company.

See testimony of BONDESSON (Rec. 239-40-41):

(Division XXIII, Subd. 4, Par. d.)

"It was a debatable question as to which way we should go * * * There was a new company coming into the field, known as the Colorado Delta Canal Company, San Francisco capitalists."

The testimony of INGRAHAM (Rec. 322-3):

"One of the chief duties that I had as local counsel. and that the Board of Directors or Governors of the Water Users' Association had was to try to make some arrangements with these various water companies that were already on the ground by which they might get out of the field and leave the way open for a government project. And we felt that this Colorado Delta Canal Company might be a stumbling block in the way, and the government engineers, as I remember, particularly Mr. Lippincott, was of the same opinion, and that proposition or the negotiations between the government and the Water Users' Association should be hastened along and brought to a conclusion in order that we might decide this matter before the field was complicated by this additional water company, the Colorado Delta Canal Company. Therefore, this letter which has been introduced in evidence, written by Mr. Winsor, president of the Water Users' Association, and, of course, on behalf of the Association, asking for the results of the preliminary surveys, the plans and estimates by government engineers, and the cost of construction, etc., should be written and in that way the matters opened for a negotiation more formally than they had been."

Also see testimony of Wm. H. LYON (Rec. 341.)

d. Before proceeding further we should consider, in connection with what must have been in the minds of the settlers as to the cost per acre of the proposed project, the formal report of the Board of Consulting Engineers, under date of April 8, 1904 (Pltffs' "Exhibit

16," Rec. 235). Their report shows (Rec. 236) that they had modified their estimates (their "Exhibit 2," Rec. 187-198), which will show that they had raised the estimate upon the Indian weir type of dam, which was the type adopted and constructed:

5th Ann. Rep. R. S. 100,

from $894,458 (Rec. 186) to $918,821 (Rec. 198), and that the estimates for engineering and contingencies had been raised from ten per centum to fifteen per centum in nearly every instance. They further show (Rec. 236) that the estimated cost of the project was so great that it was not feasible unless practically all of the land should contribute. And they deemed it imperative that all the owners should execute liens on their lands. Then it was shown by the testimony of Mr. Bondesson (Rec. 238-9) that there was practically a mass meeting held in consultation with the Board of Consulting Engineers and that it was discussed as to whether or not the lands within proposed Yuma Project could stand a charge as high as $35 per acre, it being a matter of doubt. But finally the board informed those present that they had recommended the construction of the project, notwithstanding the high cost of $35 per acre. To the same effect is the testimony of W. H. LYON (Rec. 340).

e. Then it was that, acting under the directions of the supervising engineer of the Reclamation Service, the Plaintiff Corporation, through its President and Board of Governors, addressed to the Secretary of the Interior the letter of May 3, 1904, which is the first page of the

pamphlet, our Ex. 15 Rec. 213, wherein it was prayed that the Secretary "FURNISH TO THE PEOPLE of this section, through this Association, a statement of the CHARACTER AND COST of the said proposed irrigation works (along the Lower Colorado, as shown by report of consulting engineers) with instructions as to how we shall proceed in order to do our part in securing the construction of the same." Even more significant and pointed is the request of the Board of Governors itself, of the same date of, and referred to in, the said President's letter (Pltffs' Ex. Rec. 24 and 288). and which is shown to have been signed by all the governors see testimony of O. P. Bondesson (Rec. 247), although the copy in evidence, our Exhibit 19, shows only three signatures. In that request the board on behalf of the Association and a large majority of the landowners, respectfully petitioned the Secretary of the Interior to submit through the Association to the landowners living within the boundaries of the district proposed to be irrigated and reclaimed, the Lower Colorado Irrigation District, as shown by Sec. 2, Art. IV of the Articles of Incorporation (Rec.145), COMPLETE PLANS OF THE IRRIGATION WORKS PROJECTED FOR THE LOWER COLORADO VALLEY, AND THEIR COST PER ACRE TO THE LAND THAT CAN BE IRRIGATED, BOTH public and private, together with information, etc." Mark that the Association had been organized for the purpose of, among others, paying back what should be DUE the government (Rec. 145); the Reclamation Service had been conducting exhaustive and expensive surveys and investigations for nearly two

years; that the report of the Board of Consulting Enginers had been made, our Ex. 2 and 16 (Rec. 164 to 198 and 235), showing the project as outlined could be constructed for $3,000,000, and recommending that the Supervising Engineer, Lippincott, be instructed to proceed with the preparation of detailed plans and specifications for the project (see last paragraph of Ex. 16). And the $3,000,000 be set aside in the Reclamation Fund for the construction of the project—all nearly a month prior to the writing and mailing of these pertinent and potently significant requests.

f. On May 9, 1904, the Director of the U. S. G. S., our Ex. 3, acting on the report of the Board of Consulting Engineers, reported to the Secretary that upwards of 85,000 acres could be reclaimed for less than $40 per acre, and that owing to the extreme fertility of the soil and general climate the cost of $40 per acre is NOT PROHIBITIVE; and recommended the setting aside of $3,000,000 of the Reclamation Fund for the construction of the Yuma Project (incidentally that $3,000,000 was real, honest-to-God money, actually and physically in existence in the Reclamation Fund, and not a paper appropriation. (Rec. 439).

(g) On the next day the Secretary adopted the recommendations of the Director, our Ex. 4 (Rec. 201), and actually set aside the $3,000,000 in real money to do the work. That was an answer to our requests of May 3, 1904, but to clinch the matter we received the pamphlet from the Chief Engineer, the pamphlet Ex. 15 (Rec. 213 to 228), incorporating the letter of the Secretary of May 10, 1904, which commences, "May 16, 1904, Yuma

County Water Users' Association. Gentlemen:—Your communication of May 3, 1904, etc., is hereby acknowledged. The Chief Engineer, etc., will meet you at Yuma May 27 next to confer with you, etc." (Rec. 215.)

h. In reply to your request for information as to the COST AND CHARACTER OF WORKS, the following general statement is made, etc., (Rec. 216), with certain reservations. But clearly that is answer to our requests of May 3, 1904. The surveys, etc., are shown, maps have been made, etc., ESTIMATES are shown to have been made for everything conceivable. A Board of Consulting Engineers has been through the ESTIMATES IN DETAIL, and their report is the result of the DELIBERATIONS and BEST JUDGMENT OF ALL THESE MEN, and all ESTIMATES and PLANS HAVE BEEN BROUGHT TO THE COMPLETE satisfaction of each person, including, of course, Mr. (now Director) Davis (Rec. 217). It is estimated there will be a net area altogether of 86,700 acres of irrigable land (Rec. 218). And then the dam, the canals, the Gila crossing, the levees and the drainage system are each taken up in the detail (Rec. 218 to 224) and the summary (Rec. 224) shows that the ENTIRE COST of this enterprise will amount, according to the ESTIMATES, to about $35.00 per acre IRRIGATED. It may, however, be SOMEWHAT increased or LESSENED, although an effort has been made to COVER ALL CONTINGENCIES, and the ESTIMATES of COST HAVE BEEN LIBERAL (Rec. 225). The price will RANGE NEAR $35.00 per acre, to be paid in ten annual installments. All of which closes with the official declaration of the Secretary that

upwards of 85,000 acres can be reclaimed at LESS THAN $40.00 per acre (Rec. 226).

i. Then the landowners and settlers were gathered together at Yuma, Arizona, on the day and night of May 28, 1904, at the request of the Secretary. Practically everyone interested was there, in person or by proxy (Rec. 325-6, and the preceding Div. XXII of this Argument). The Pamphlet, Pltffs' Ex. 15, was delivered to all of them; and at night in the mass meeting the Chief Engineer and the Supervising Engineer addressed them at length and fully explained to them the nature of the project, its cost and worth to them, and how long it would take to build it. Each of them was positive that the work could be, and would be, completed for the estimated cost of $35 per acre, within two years from the time the work would actually commence:

See testimonies of

BONDESSON, Rec. 266-7 and 8;
INGRAHAM, Rec. 328-29-30-31-32;
LYON, Rec. 340-41-42;
GREER, Rec. 353-54;

And the Chief Engineer, to put the finishing touch on things, gave it as his opinion that the cost would rather underrun than overrun the estimated figures, and that it would be materially LESS than $35 and that figure allowed for everything. His speech was rather elaborate—quite complete (BONDESSON—Rec. 260), and as we have heretofore shown, and as appears at pages 275, 333, 342, 347 and 354 of the Record, they believed in and relied upon the contents of the pamphlet and the

statements of the engineers, and were induced thereby to mortgage their lands to secure the estimated cost, and they would not have done so if they had not believed in and relied upon the pamphlet and the engineers.

j. Then and there, as expressed by the Supervising Engineer in his telegram of May 10, 1904, Pltffs' Ex. 20 (Rec. 250), the proposition was entirely dependent on the irrigators—the settlers and landowners signing contracts, it being immperative that they execute liens on their lands (Board of Consult. Engrs.' Rep. Rec. 236), and thereby mortgage their homes to secure the ESTIMATED COST of the construction (3rd Ann. Rep. R. S. 55); and they had the advice of their counsel (as more fully shown in Par. c, Subd. 2, of this Div. XXIII, p. 164 supra), that the mortgage could not exceed the estimate as made and announced; also it would be the same as turning over their lands and saying to the Secretary, 'Take this, and do as you will with it.'" (Rec. 333.)

k. The land owners and settlers were equal to the emergency, they granted the imperative lien, they did sign the contracts, following the "instructions" as to how they "should proceed"—they MORTGAGED THEIR LANDS to secure the REPAYMENT OF THE ESTIMATED COST OF CONSTRUCTION OF THE PROJECT; and, we ask, what must have been in THEIR MINDS, what must have been THEIR INTENT, when they did so? There can be but one possible answer, and it is obvious: to get a complete irrigation plant, and to pay $3,000,000 therefor at about, or ranging near, $35.00 per acre, in no event to exceed

$40.00 per acre.

l. What must have been in the mind, and what must have been the intent, of the Secretary of the Interior? To wilfully, ingeniously, and disingenuously, mislead the landowners to believe that the cost, and the estimated cost, of the project was to be LESS than $40.00 PER ACRE, in the aggregate $3,000,000 (even that amount known to the Secrertary to be just on the verge of being prohibitive to the landowners, see Pltffs' Ex. 3 (Rec. 200); and thereby induce them to place a blanket mortgage on their lands to secure any sum that he or some other Secretary might 13 years later foolishly, corruptly or arbitrarily assess against their lands, knowing all the time that the project could not and would not be built within any reasonable time for anything like the estimates? Perish the degrading thought! Our national pride, our reliance upon honest human nature, the common experience of the commercial world, forbid any such debasing and impossible conclusion. The obvious and correct answer is that the Secretary, from the surveys, maps, plans and ESTIMATES of COST knew what he was doing and that the project COULD BE AND WOULD BE COMPLETED within two years from the commencement of work for the sum of $3,000,000, at a cost of less than $40.00 per care; and that he intended to deliver a completed irrigation project for that amount of money, and at that charge per acre.

m. The contract is dated May 31, 1906, but the testimony of Bondesson (Rec. 317), the directions of Par. 24, of the Pamphlet of Organization of W. U. Ass'ns (Par. b, subd. 1 of this Div. XXIII, supra), and the con-

tract's own terms (2nd "Whereas," Rec. 42) shows that it was contemplated by both parties thereto to have gone into effect immediately after May 28, 1904, at any rate, the liens, the Articles of Incorporation, and the contract are one, as before shown. In any event, on May 31, 1906, there had been no change in the conditions, plans, or estimates.

4th Ann. Rep. 97, et seq.

n. What then was the mutual intent of the parties to the contract? The answer is just as obvious as the answer to the other two questions—to have a complete going irrigation project, over the whole district, at a cost of $3,000,000, and less than $40.00 per acre. It is absolutely conclusive, as we see it, that we did not waive our rights by the contract.

(Division XXIV, Subd. 1, Par. a.)

## XXIV.

## "THE PROPOSED WORKS" HAVE NOT BEEN COMPLETED.

In our 24th ground of the First Specification of Error we assail the finding of the Trial Court (Rec. 563-4), to the effect that from a practical standpoint it is thought that the Yuma Project was completed on April 6, 1917. That finding we believe to be as entirely unsupported by the evidence as is the finding set forth in our 15th ground of the First Specification of Error, to the effect that the annual net revenue per acre of the project (Rec. 561); but, not only that, it is directly contrary to all the evidence, and unsupported by the pleadings, as we shall proceed to show in the following:

### 1.

### WHAT ARE "THE PROPOSED WORKS?"

a. The contract provides (Rec. 44) that the first annual payment for the Yuma Project "shall be payable at the time of the completion of said proposed works." Clearly there is no ambiguity as to the time when the first payment shall be made; but as there are no plans or specifications annexed to the contract, and no reference to any such, we must look outside of the contract to determine what are "the proposed works." The dedefendants offered no evidence and advanced no theory as to what the proposed works are. It may be that later in their brief, or oral argument, they may contend that the nature, scope, and extent of "the proposed works" rests entirely in the prophetic mind of Director Davis. However, we have a definite and well defined theory of what "the proposed works" were in 1904-5-6 when the

contract was finally executed; and we offered voluninous evidence to establish that theory.

b. The proposed works are clearly and certainly set forth and described in the Pamphlet, Pltffs' "Ex. 15" (Rec. 213-228); and in Pltffs' Ex. 2 (Rec. 164-198); but more vividly delineated on the large map, Pltffs' "Ex. 26," not incorporated in the record, but here for inspection. A replica of the map made part of Pltffs' Ex. 15 is shown on the next succeeding page. As shown by all the oral evidence we contracted on the Pamphlet, Plttfs' Exhibits 15 and 26. Substantially the same description of the project is set forth in:

3rd Ann. Rep. R. S. pp. 192-199.

There is also a map at p. 192 of that Report marked "General Map of Proposed Yuma Project," which is substantially the map set forth here. And in the 4th, 7th and 8th Annual Reports of the Reclamation Service, at pages 97, 59 and 54, respectively, will be found the statement that detailed information and description of the Yuma Project will be found in the 3rd Annual Report.

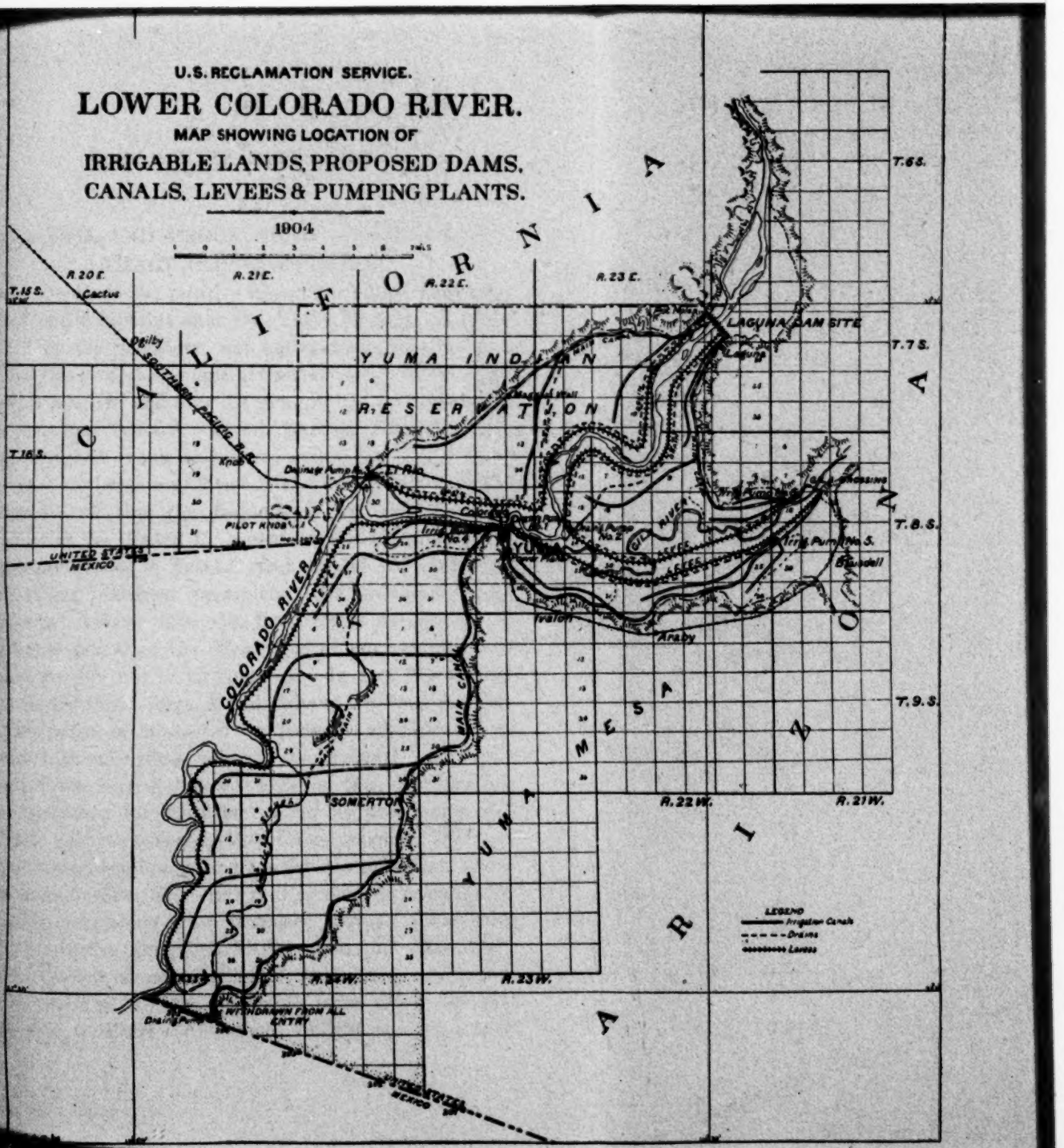
c. But the map in the Report we never saw; and, as heretofore repeatedly shown the Pamphlet, Pltffs' "Ex-15," was extensively and industriously circulated for years; at least two reprints thereof having been made and circulated (Rec. 310); and not only did all the landowners and settlers contract with reference to the pamphlet; but all the new purchasers of land for years acquired title to their land on the strength of it (Rec. 279 and 348-350).

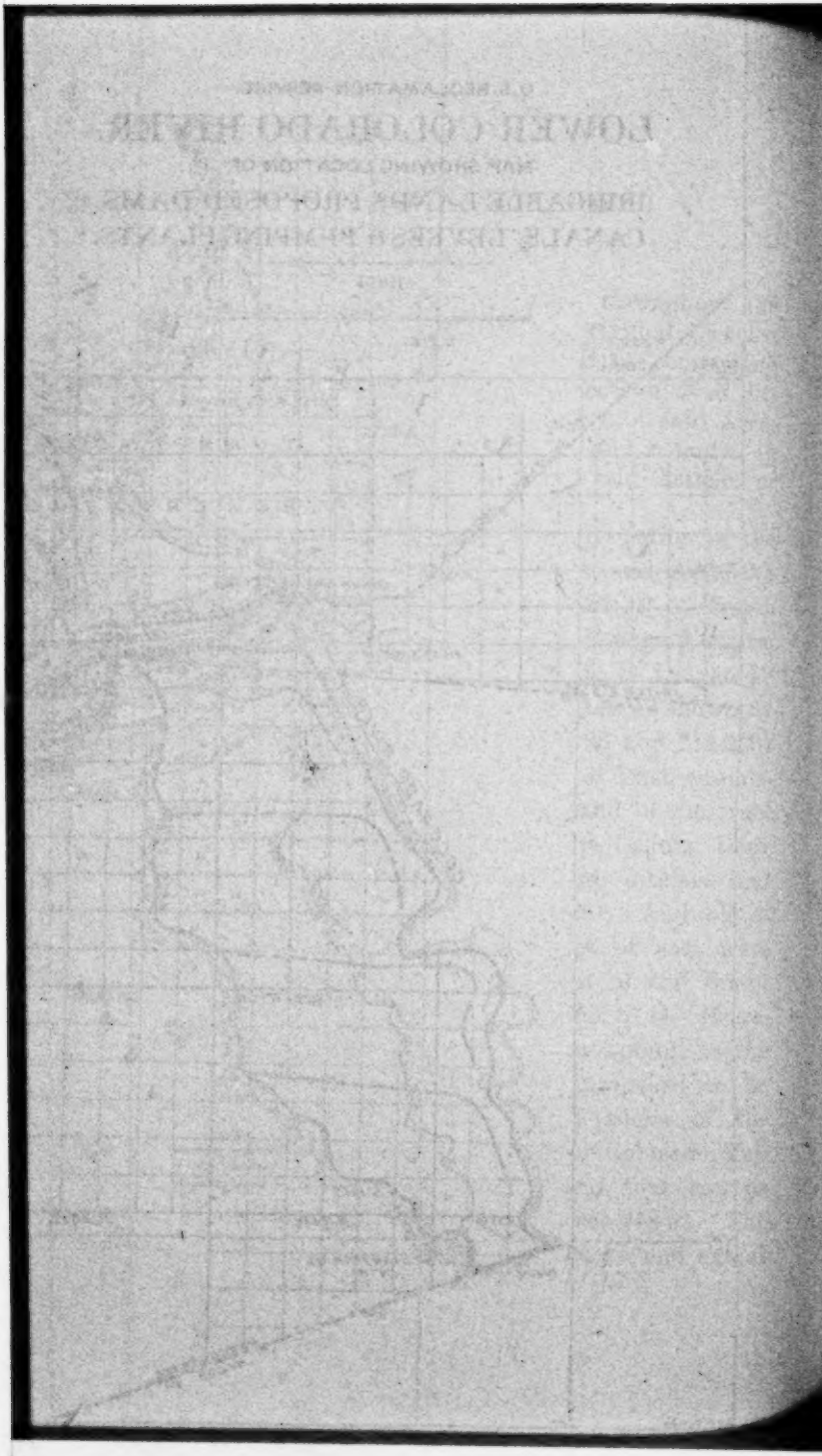
d. There can be no doubt or ambiguity as to the area which was to be reclaimed. The contract itself (Rec.

44) provides that:

"The cost per acre shall be equal throughout the entire district now proposed to be irrigated thereby, which said district is hereby defined as comprising the lands described and bounded in Section 3 of Article IV of the Articles of Incorporation of said Association, and also the lands described and bounded in Article IV of the amendments of the said Articles of Incorporation of said Association."

And reference to the Articles of Incorporation of the Association. Sec. 3 thereof (Rec. 145-6) and Article 4 of the amendment (Rec. 161), shows that all of Tracts A, B and C, as shown on Piltffs' "Ex. C" page 9, supra, constitute "the entire district proposed to be irrigated" by the contract. That is, the United States, as shown by the plans and specifications (Rec. 164-198 and 213-228) proposed and, by necessary implication at least, promised to reclaim all of Tracts A, B and C and to construct thereon and thereover, in addition to the Laguna Dam, an adequate system of canals, drainage ditches, and levees, as shown on the plat (Rec. 228). And all of those plans, specification and estimates of cost were furnished us in response to the request of the Board of Governors of the Plaintiff Association to the Secretary, under date of May 3, 1904, that he submit to the landowners living within the district proposed to be irrigated and reclaimed "COMPLETE plans of the irrigation works projected for the Lower Colorado Valley and their cost per acre to the land that can be irrigated, both public and private" (Rec. 248-9). The foregoing, we believe, determines the nature and extent of "the proposed works."


U.S. RECLAMATION SERVICE.
LOWER COLORADO RIVER.
MAP SHOWING LOCATION OF
IRRIGABLE LANDS, PROPOSED DAMS,
CANALS, LEVEES & PUMPING PLANTS.
1904
CALIFORNIA
ARIZONA
YUMA MESA
YUMA INDIAN RESERVATION
LAGUNA DAM SITE
Laguna
Dillby
SOUTHERN PACIFIC R.R.
Cactus
PILOT KNOB
Drainage Pump
El Rio
Main Canal
Gila River
Yuma
Araby
Irrig. Pump No. 5.
Brunswell
Ivaton
Levee
COLORADO RIVER
SONERATON
UNITED STATES
MEXICO
WITHDRAWN FROM ALL ENTRY
R. 20 E.
R. 21 E.
R. 22 E.
R. 23 E.
T. 15 S.
T. 16 S.
T. 6 S.
T. 7 S.
T. 8 S.
T. 9 S.
R. 22 W.
R. 21 W.
R. 24 W.
R. 23 W.
LEGEND
Irrigation Canals
Drains
Levees



(Division XXIV, Subd. 1, Par. a.)

2.

PLEADING AND PROOF SHOW DRAINAGE FOR TRACT C UNCOMPLETED.

a. We made the positive allegation (Rec. 16) in Par. 18 of our complaint that the Yuma Project, as determined by the Secretary, was not completed at the time of the filing of the complaint; setting forth in said paragraph wherein and how the project was not completed, showing that Tract A was only partially completed and that it lacked canals and levees and a drainage system; and that no portion of Tract B had been in any way reclaimed; and that the drainage system had not been completed for Tract C, except about three miles of drainage ditches in Tract C, and that 44 per centum of the project remained incomplete. We contend that defendants' Answer (Par. 18, Rec. 92) is not an apt or sufficient denial of the allegations of our complaint as to the project not being complete. In fact the defendants admit that Tracts A and B have not been reclaimed, irrigated or protected by levees; and there is no denial that only three miles of the drainage system for Tract C has been completed; alleging that drainage has been provided for the same as far as practicable and feasible and the necessity therefor is revealed; and that proper provision has been made for the necessary drainage thereof (Rec. 93). But that is not, we respectfully submit, completing "the proposed works." The map annexed to the Pamphlet, Pltffs' "Ex. 15" (Rec. 228), shows thereon about 22 miles of main drain, and plaintiffs' "Exhibit 2," the estimates, show (Rec. 185 and 195) that in Tract C there was 116,160 feet, or almost

exactly 22 miles, of main drainage provided for in the original estimate; and any allegation in the Answer that the defendants, or the Secretary, have provided drainage for Tract C, as far as practicable and feasible and the necessity therefor is revealed, and that proper provisions have been made for the necessary drainage thereof, is not a denial of our positive allegation, and it is not an averment of the fact, that those 19 miles of drainage canals, or any part thereof, had been completed within the meaning of the contract. We respectfully submit that on the pleadings alone we are entitiled to a reversal in this case.

b. If there should be any doubt as to whether or not there is an apt and sufficient denial of our allegation that the project was not completed on April 6 1917, and could not be, and would not be, for some two and a half years thereafter, we appeal to the uncontradicted evidence to show that the project was not completed on April 6, 1917, or even yet at the time of the trial of this case. At the time of the trial the witness Oscar P. Bondesson proved without contradiction (Rec. 358), that the "drainage system for Tract C is not completed. A drainage canal has been opened from near the Mexico line, extending northeastward somewhat centrally through the valley for a distance of twelve miles. At the lower terminus of this drainage canal is situated a pumping plant in which a PART of the units for pumping have been installed, and a part have not been installed; and (Rec. 359) one-third of the main canal is incomplete." The only attempt to refute or explain away Mr. Bondesson's testimony was by Mr. Davis (Rec. 404) by the promulgating of some esoteric reela-

mation-service theory that because other and further drainage might perchance be needed after the completion of the main drain that therefore the main drain while only about one-fourth completed was, "for all practical purposes," completed. We have no doubt that that sort of reasoning will be clearly understood by the sort of people that can understand and construe "estimated cost" to mean the actual computed cost after some twelve years of work, and who can construe the word "thereupon" to mean thirteen years thereafter; but we respectfully submit that to the average human being that kind of reasoning is not understandable. Mr. Davis showed by his testimony (Rec. 401-2) that drainage is necessary in Tract C. But if he had not shown it by his testimony, he would be estopped to deny the necessity of the drainage by his own and the Secretary's report to Congress.

15 Ann. Rep. R. S. 75-77,

shows that on December 4, 1916, within four months of the issue of Public Notice of April 6, 1917, relied upon by the defendants, no work had yet been done upon the drainage system in Yuma Valley; but that preliminary plans were considered and some investigations carried on for the work proposed:

16th Ann. Rep. R. S. 62.

"Surveys for main drain and laterals were in progress in Yuma Valley. Elevations on test wells at practically all section corners of the valley were taken, and these denoted a general rise in the ground water. Construction work was started on the main drain the latter part of December, 1916. Up to June 30, 1917, the work had progressed to station 146.

(Division XXIV, Subd. 1, Par. c.)

The yardage amounted to 113,794 cubic yards. Fiive highway bridges and four metal flumes were constructed over drainage canals. A temporary pumping plant was built and operated at the lower end of the drain."

And which also shows the state of the work on the main drain in Tract C on June 30, 1917, three months after the issuance of the Public Notice.

c. Notwithstanding the opinion of the Circuit Court of Appeals, that it is of no real importance, the causing of us to begin the payment of the installments of the cost of the project even one month too soon, is a material and serious injury and damage to the plaintiffs, and each and all of them. Immediately upon the becoming due of the first installment of the cost on December 1, 1917, as required by the purported Public Notice of April 6, 1917, defendants' "Ex. 8" (Rec. 469), and according to its terms (Rec. 472), and the terms of the water right application, Pltffs' "Ex. D" (Rec. 50), the plaintiffs will be mulcted in interest and penalties to the extent of at least 1 per cent per month on the unpaid installments—that rate of interest and penalty being prescribed by he 20-year Extension Act of August 13, 1914;

38 Stat. 686.

According to the undenied allegations of the complaint the Public Notice of June 6, 1917, was, in any view of the case, premature to the extent of 2½ years. Surely if the defendants can insist that the contract means what it says, and that it is unamibuous, when it says that the plaintiffs shall pay that "part" of the cost apportioned by the Secretary, we have the right to insist

that the contract be enforced to the letter where the language is certainly unambiguous, in providing that we shall not pay the first installment until the completion of the proposed works.

d. If there were only some trifling thing to be done to complete the project, such as the construction of a headgate here, or the placing of a small lateral there, or something of that sort, we would not, and probably could not equitably, complain, but with practically nineteen miles of main drainage canal to be built on June 30, 1917, three months after the issuance of the Public Notice (as we believe the Court will take judicial notice that a station in civil engineering is 100 feet; and the 16th Ann. Rep. page 62 shows that the work on the drainage canal had been extended only to station 146, considerably less than three miles) is not a trifling thing, but a material and substantial part of the project; and until the main drainage in Tract C was constructed, the proposed works were not completed, even on the defendants' own theory; leaving out of consideration altogether the fact that nothing had been done on Tract B, and but very little on Tract A. We respectfully insist that on the pleadings and the proof, and even accepting the appellees' own theory of the case, in everything but as to the completion of the drainage system in Tract C, we are entitled to a reversal in this case on the plainest principles of law and equity. The contract has not been complied with either in letter or in spirit; and it will be inequitable and wrong to require the plaintiffs to commence paying the installments on the amount due for the cost of the construction of the project, whatever it

may be, at least 2½ years prior to the time that we had contracted to make the first payment.

3.

THE GILA VALLEYS ARE PART OF PROJECT

We now approach what we deem to be one of the most astonishing set of circumstances in civil engineering and equity jurisprudence; that is, the facts concerning the completion, or non-completion ,of the Gila portion of the Yuma Project, and its purported elimination from the project.

a. We contend that from the 10th day of May, 1904, until the filing of this suit on June 30, 1917, the Gila portions of the Yuma Project, Tracts A and B, were part of the Yuma Project, and were such parts legally, rightfully and contractually; and as a feasible, practicable engineering proposition; and that so far as any legal of effective action has been taken by the Secretary (if he were vested with such power) Tracts A and B are part of the Yuma Project today. On this we are not resting on any construction of the contract or description therein of the proposed works, but upon the express statements of the Secretary made fourteen consecutive times over his official signature; and in a variety of different ways; and in practically every instance particularly describing Tracts A and B by acres. Here is the list:

A, Letter of May 10, 1904, Plttfs' Ex. 4 (Rec. 201),
B, 3rd Ann. Rep. R. S. 63, 192, 196, 197.
C, 4th Ann. Rep. R. S. 98 and 99.
D, 5th Ann. Rep. R. S. 100, 101, 102, 103.
E, 6th Ann. Rep. R. S. 74 and 76.

(Division XXIV, Subd. 3, Pars. b, c and d.)

F, 7th Ann. Rep. R. S. 59.
G, 8th Ann. Rep. R. S. 54.
H, 9th Ann. Rep. R. S. 73.
I, 10th Ann. Rep. R. S. 74.
J, 11th Ann. Rep. R. S. 55.
K, 12th Ann. Rep. R. S. 60 and 344.
L, 13th Ann. Rep. R. S. 74 and 76, 408 and 409.
M, 14th Ann. Rep. R. S. 57, 59 and 404.
N, 15th Ann. Rep. R. S. 69, 71, 73 and 658.

b. But so that there may be no misapprehension, and for the convenience of the Court, we here set forth at length some of the statements in the reports to Congress.

In the 5th Report, at page 100, we find the following:

"At the Yuma Project (Pl. XII) the waters of Colorado River will be diverted about 10 miles northeast of Yuma, Ariz., into two canals, one on each side of the river. In Arizona these canals will lirrigate all the bottom lands of Colorado and Gila Rivers between the Laguna Dam and the Mexican boundary, and in California the bottom lands in the Yuma Indian Reservation."

c. And in the 7th Report, at pp. 59-60, we find the following, which was substantially repeated in the 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th Annual Reports:

"A detailed description of the Yuma Project will be found in the 3rd Annual Report ,and general descriptions relating to the project are given in the Second, Fourth, Fifth and Sixth Annual Reports. Briefly, the present irrigation plan of this project involves the construction of the Laguna Dam across the Colorado River about 10 miles northeast of Yuma, Arizona, for the purpose of divreting water into two canal systems,

one on each side of the river, covering lands in the Colorado and Gila River valleys in the vicinity of Yuma."

d. We take the following from a table, containing other immaterial matters, in

14th Ann. Rep. R. S. 404.

IRRIGABLE AREA.

| Ariz.-Calif.: Yuma— | Acres. | Total Acres. |
|---|---|---|
| Gila Valley (Ariz.) | 19,000 | |
| Yuma Valley (Ariz.) | 53,130 | |
| Mesa Pump (Ariz.) | 40,000 | |
| Reservation (Cal.) | 15,127 | 127,257 |

e. Then we come to the 15th Annual Report made to Congress on December 4, 1916, just four months prior to the issuance of the purported Public Notice of April 6, 1917, and in that volume we find the following statements at the following pages:

"IRRIGATION PLAN.

"Page 69. The irrigation plan of the Yuma Project provides for the diversion of water from the Colorado River at the Laguna Dam, 10 miles northeast of Yuma, Ariz., into two canal systems, one heading on the California side, conveying water to the irrigable lands on that side of the river, including those in the Yuma Indian Reservation, crossing the river at Yuma through an inverted siphon and serving lands in the Colorado Valley below Yuma, and the other heading on the Arizona side of the stream and watering lands in the Colorado and Gila Valleys lying east of the Colorado and north of the Gila * * *

"CANAL SYSTEMS.

"Page 71. The Gila Valley unit comprises 16,000 acres, of which 10,000 lies SOUTH and 6,000 NORTH of the river. The Arizona main canal has been con-

structed for a distance of 4.7 miles below Laguna Dam. Work on this canal was commenced in April, 1909, and finished in February, 1912. The capacity is 250 second feet and the yardage moved was 156,000. Connecting with this canal are 14 miles of laterals, which were built from April, 1911, to February, 1912, and January, 1913, to April, 1913. This system partially supplies a gravity area of 4,000 acres. In 1913 a pumping plant was installed, which can water an area of 2,000 acres. No construction work has been started in the South Gila Valley."

f. At page 658 of the 15th Annual Report, where the irrigable area of the various projects is set forth in an elaborate table, from which we take, excluding several columns that are not material here, the following for the Yuma Project:

IRRIGABLE AREA.

| State, Project and Unit— | Acres. |
|---|---|
| Arizona-California-Yuma | 128,000 |
| Arizona | 113,000 |
| California | 15,000 |
| Units— | |
| Gila Valley (Arizona) | 18,000 |
| Yuma Valley (Arizona) | 55,000 |
| Mesa Pump (Arizona | 40,000 |
| Reservation (California | 15,000 |

g. And we find from 16th Ann. Rep. R. S. 63 et seq. that the following work was done and expenditures made on the Gila portion of the project during the fiscal year ending June 30, 1917, and as late as March, 1917, as well as an estimate of contemplated work for the fiscal year of 1918, for the sum of $2,000!

(Division XXIV, Subd. 3, Pars. h and i.)

(Page 63) "Gila Valley: In February and March, 1917, the upper 4 miles of the Arizona levee were raised an average of 18 inches by means of drag-line excavator, 23,988 cubic yards of earth being moved in this work. In July, 1916, 990 cubic yards of rock were placed at the upper end of the levee. In January, 1917, 1,098 cubic yards of rock revetment were placed at the end of spur dike No. 3."

(Page 63) "North Gila Valley, 18.5 miles of canal in operation."

(Page 67) Shows expenditure of $8,750 on Gila Valley portion Yuma Project during fiscal year 1917, for floor protection."

(Page 68) "Estimated cost of contemplated work, Yuma Project, during fiscal year 1918.

(Among others)

North Gila Valley.....$2,000"

h. And a startling and significant fact is gathered from Mr. Davis on cross-examination (Rec. 449-450-1), wherein it is shown that the levy, or charge, per acre for the cost of the Laguna Dam is $16.60; on a gross cost for the dam of $2,103,361, which is the actual cost of the dam.

15th Ann. Rep. R. S. 82,

and divided by 127,251, the number of acres in the project (14th Ann. Rep. 404), gives $16.60 per acre.

therefore, showing conclusively that the cost of dam was levied over the Gila portion of the project! Once again was Mr. Davis' utterly refuted by the official reports.

i. To summarize the foregoing evidence (and we again remind the Court that in accordance with the stipulations of the parties and the order of the Lower Court, Rec. 203, 208, all these public documents are in

evidence), it appears as a fact that at the time of the determination of the practicability of the Yuma Project on May 10, 1904, continuously down to December 4, 1916, just four months before the issuance of the Public Notice in this case, and in all human probability long after the Public Notice had actually been prepared, the Secretary of the Interior had officially determined at least sixteen times that the Gila portions of the Yuma Project was practicable and advisable; and that as late as March, 1917, six days before the date of the Public Notice, the Reclamation Service was actually performing work and expending public moneys thereon; that eighteen and a half miles of canals were actually in operation on the North Gila portion, and that some time during the 1917 fiscal year $8,750 were expended for flood protection on the Gila Valley portion of the project, and that on December 5, 1917, when the 16th Report was made to Congress, and eight months after the issuance of the Public Notice in this case, that there was an estimated cost, or appropriation, of $2,000 for the North Gila portion of the project, Tract A, as described in plaintiffs' complaint, and the cost of the dam was actually levied at the rate of $16.60 per acre on Tracts A and B. "May we not" again appeal to the doctrine laid down in

Swigart vs. Baker, 229 U. S. 187,

and say, Congress having so frequently had those reports before it, and not having acted adversely upon them, or any of them, that it has become the law of this case that the Gila portions are a part of the project; or, at least, that the Secretary and the appellees are es-

topped to say that they are not part of the project?

Thus according to the solemn and official announcement of the Secretary himself Tracts A and B were an integral and feasible part of the project to the extent of 18,000 acres on December 4, 1916, and that in March, 1917, he was causing work to be done thereon. Certainly no action of the Secretary or the Director of the Reclamation Service was taken between the last mentioned dates and the institution of this suit on June 30, 1917, or else the defendants in this case would have produced some evidence tending to prove that fact.

j. It will not do to say, as was argued below that the Public Notice of April 6, 1917, declared the Gila portions of the project unfeasible, or eliminated them from the project (if such were possible). We may scan the notice (Rec. 469-74) from A to Izzard, and there is not a single reference to the Gila portion of the project or any part of it; it deals solely with the lands in Tract C; and it is no different in any way from the first Public Notice issued for the Yuma Project on January 12, 1910:

9th Ann. Rep. R. S. 79.

There are some more things in the first Public Notice, because of it being former Indian land being first settled and entered upon. But as in the Public Notice of April 6, 1917, it describes the land subject to the Public Notice, and otherwise purports to conform to the provisions of Sec. 4 as to those particular lands.

k. It might just as well be argued that when the Public Notice of January 12, 1910, was issued for the Indian Reservation portion of the Yuma Project that that Notice ipso facto and eo instanti determined the

Arizona portions of the Yuma Project to be no longer feasible or practicable, and thereby eliminated them from the project, as it is to contend that the notice of April 6, 1917, eliminated the Tracts A and B from the Yuma Project; even if it should be conceded that the Secretary of the Interior had the power by a stroke of his pen in the year 1917, to determine them unfeasible and elminate them from the project.

4.

TRACTS A AND B FEASIBLE AND ADVISABLE.

a. But even on the question of the feasibility of the Gila portions of the project, we have met Director, and Witness Davis on his own ground, and defeated him. The Trial Court not having passed upon or decided the question of feasibility, attempted to be raised by the Answer (Rec. 92, and sustained by the testimony of Mr. Davis; therefore, we may contend here, we believe, that on that point we have the preponderance of the evidence.

b. Francis L. Sellew, a civil engineer of as long standing as Mr. Davis, and of more varied experience; and for nine years Project Manager of the Yuma Project (Rec. 507) gave as his opinion that the project was not completed; Rec. 507 (and that was certainly bringing coal to Newcastle); and goes on (Rec. 508-9-10-11 and 12) to fet forth an apparently logical and necessary plan for the control of the Colorado River and the completion of the Yuma Project as a whole, as originally planned, as shown by Plaintiffs' Exhibit 2 (Rec. 164-198) and 15 (Rec. 21-23-28); and that he prepared such a plan, and reported it to his superiors (Rec. 510) in 1912;

and that in the Summer of 1913 he made another report to the same effect, and in December, 1913, a Board of Consulting Engineers, consisting of Gen. Wm. L. Marshall, U. S. A., Consulting Engineer to the Secretary of the Interior, and Louis C. Hill, a Supervising Engineer of the U. S. R. S., was appointed (Rec. 512), and that they endorsed his plans (Rec. 510), which were later approved in Washington (Rec. 511), and the work ordered done, and actually done (Rec. 518).

c. See the report of the consulting engineers, Pltffs' Ex. 33 (Rec. 513-18); and we find by

13th Ann. Rep. R. S. 74, 1914:

"Arizona side, above Yuma: The work of river-front protection consisted of establishing a camp at Laguna Dam, opening quarry, laying track for 7 miles below the same, construction of 3 SPUR DIKES, etc."

And we find

14th Ann. Rep. R. S. 58, 1915,

"GILA VALLEY: No work was done on this branch of the levee system, EXCEPT that * * * 360 yards of rock was placed on SPUR DIKES 2 and 3 of Arizona levee."

And we find in

15 Ann. Rep. R. S. 74-5-6, 1916,

(P. 74) "That it was determined in 1913 to attempt the protection of the levees on the Arizona side, 5 miles below Laguna Dam, by abatti dikes, and that two were built of combined length of 1,800 feet, and

Pp. 74-5) "Further details the work done in 1914 on the SPUR DIKES;" and

(P. 76) "That during the fiscal year 1915-6, in Gila Valley, 9,000 yards of rock placed * * * and

in revetting ends of dikes, whose purpose it was to REGULATE the river channel," and

And we find in

16th Ann. Rep. R. S. 63, 1917.

"In January, 1917, 1,098 yards rock revetment were placed at the end of SPUR DIKE No. 3."

d. The foregoing evidence has the double effect of utterlly destroying the force and effect of Mr. Davis' testimony of the non-feasibility of the Gila portions of the project; first, by contradicting him by Sellew, Marshall and Hill; and later by another board consisting of Marshall, Hill, Henny, Long and Sellew (Rec. 519); and then by Mr. Davis himself, for in 1914 he was Chief Engineer (13th Rep. 477), and in 1915, 1916 and 1917, he was Director and Chief Engineer (see 14th Rep. 477; 15th Rep. 772 and 16th Rep. 558), and he is certainly the officer at Washington who approved of the Sellew plan; and he is estopped to deny it, as his name is signed to each of the three last-named reports on the letters of transmittal; and second, by showing, again the official and, as we contend, the Congressional approval, ratification, and re-determination of the practicability and advisability of the Gila portions of the Yuma Project.

e. Let us not be misunderstood. We are not asking, before we should be required to commence paying the estimated cost of the project, that the levees and river banks be rock-revetted, and all that sort of expensive work done. We are simply asking that "the proposed works," as set forth in the plans and specifications, Pltffs' Exhibits 2 and 15, the earth levees, and sufficient canals be built as outlined in 1914; and if then it

should be determined that other and more expensive works are necessary to preserve them, a new contract could be made therefor under the provisions of Sec. 4 of the 20-year Extension Act, 38 Stat. 686.

f. It may very well be that the contract, by its express terms, requires the United States, to do nothing whatever; although, if it were necessary, we should strenuously contend that by the strongest implication it requires the government to construct "the proposed works" according to the plans and specifications, Pltffs' Ex. 2 and 15, and within two years from the time of the commencement of the work, as promised by the Chief Engineer, on May 28, 1904. But we are not here asking for a mandamus to compel the Secretary to perform his contract, we are simply seeking to enjoin him from compelling us, by wrongful and inequitable means, to begin payments for the construction cost before they are due, to our great and irreparable damage. To quote the opinion of the Trial Judge, the terms of the contract "are perfectly plain and positive" that the first payment shall be made at the time of the completion of said proposed works. We are asking that those perfectly plain and positive terms be enforced.

5.

## THE ATTEMPT TO ELIMINATE TRACTS A AND B FROM THE PROJECT

a. Now we come to the belated attempts of the defendants, and their superior officers, by some sort of an ipse dixit. or an "imperium in imperio," as it were, to eliminate the Gila portions, Tracts A and B, from the Yuma Project; heretofore made a part of the sub-

ject-matter of our 13th Ground of the First Specification of Error and the argument in support thereof. Assuming that J. G. White & Co. (the contractors for the dam) had taken the contract from the plaintiffs to construct the entire irrigation system for the Yuma Project for the gross sum of $3,000,000, and, within the time limited in the supposed contract, had completed the project, to the extent that it is now completed by the Reclamation Service, and we refused to pay the contractor for the reason that it had not complied with its contract, and the contractor was suing on the contract, and we should set up in our defense that it had entirely failed to do any work whatsoever upon the south Gila portion, and had done but very little on the North Gila portion; would it not be a ludicrous spectacle in a court of law for he contractor, after that defense had been raised and urged, to say that it, the contractor, had without our knowledge or consent, and after the action had been instituted, determined that the Gila portions of the project were no longer feasible, and, through its Chief engineer, had so declared, somewhere out of our hearing and beyond our knoweldge; but that, nevertheless, it was entitled not only to the original contract price, equaling the charge of about $35 an acre, but that it was entitled to enough money to equal a charge of $75 per acre? Of course, a contractor in a case of that kind would not be seriously listened to; and yet that is precisely what the defendants are attempting to do in this case; and are so attempting without any warrant of law and in spite of the law, and in direct violation of the terms of the contract.

(Division XXIV, Subd. 5, Par. b.)

b. It was urged below, and apparently with great success with the Trial Court, that the Secretary was, in effect, some sort of an autocratic ruler like unto the former Czar of Russia, or else that in everything in connection with a reclamation project he is acting in a judicial capacity, and that a mere contract with this autcratic officer meant nothing at all, as he could rescind it at any time in his discretion; and the defendants, as in the case of the Public Notice, iterated and reiterated, in season and out of season, in thei objections to the evidence, in their oral argument, and in their written brief, "In the Secretary's discretion!" "In the Secretary's discretion!!" "in the Secretary's discretion!!!" When, as a matter of fact, the Secretary has no discretion whatever in any matter connected with this suit. Any discretion that he ever had was EXERCISED and EXHAUSTED when, on May 10, 1904, he deermined the Yuma Project to be practicable and advisable; and he more certainly yet LOST the LAST VESTIGE OF DISCRETION vested in him when he SIGNED THE CONTRACT in issue here. We challenge the industry and ability of learned counsel on the other side to produce to this Court A SINGLE AUTHORITY supporting their contention that the Secretary is vested with any discretion whatsoever to MODIFY or VARY the TERMS OF THE CONTRACT OF MAY 31, 1906. Again we remind the Court that the United States of America, even when it acts in cases of this kind through its AUTOCRATIC and ALL POWERFUL Secretary of the Interior (as contended for by the defendants), it is a mere private corporation, and it is BOUND by its

contracts like any of its citizens:

39 Cyc. 742—Note 5—supra.

And, if in this case, there had been any MISTAKE in the investigations, calculations and estimates of cost of the Engineers, and the Consulting Board of Engineers (consisting of, among others, Mr., now Director, Davis), in the year 1904, the proper remedy, to get relief from that mistake, would have been a suit in equity to reform the contract, instead of attempting by a stroke of the pen, or rather without a stroke of the pen, and simply by the testimony of a biased and interested witness to rescind a SOLEMN, WRITTEN CONTRACT, entered into fifteen years before.

[Mr. Davis while on the stand persisted, as we thought, in issuing his ipse dixits, to which we objected (Rec. 390), but the Court held that it deemed the witness to be simply testifying AS AN EXPERT. Therefore, as we shall later show, there is nothing in this case eliminating the Gila portions from the project, except the testimony of Mr. Davis. As to Mr. Davis being a biased and interested witness, we offer that in its least invidious sense, but there can be no doubt that Mr. Davis deeply resents the bringing of this suit, and he is certainly interested that his views and actions as Director of the great Reclamation Service should be sustained. And while we have, justly we believe, assailed the business methods and financial wisdom of the officers of the Reclamation Service and asserted, and now assert, that their "Force-Account" system is a time-destroying and money-eating monster

(* * * "of so frightful mien,

As to be hated needs but to be seen;
Yet seen to oft, familiar with her face,
We first endure, then pity, then embrace.")

Yet their works are, in many instances, monuments to the genius of American engineering and, while there have been unsavory rumors amongst the uninformed rabble, no one of common information has yet charged the Reclamation Service, or any of its principal officers, with graft or fraud; and the best evidence that such charges, if made, would have been unfounded, is that F. H. Newell, who for 12 years was Chief Engineer and Director of the Reclamation Service, is now, as we are informed, teaching in an obscure college in Illinois.]

c. And, at this point, we ask the Court to contemplate the ludicrous spectacle that a law officer of the United States would present, coming into a court of equity in the summer of 1917, and asking the Court to reform a contract entered into under date of May 31, 1906, but in fact in the summer of 1904, after two years and $175,000 had been spent in making investigations to determine if the project were practicable and advisable and, after the Secretary had for 14 consecutive times reported to Congress, as required by law, that the project WAS PRACTICABLE and ADVISABLE, and that he had been spending money upon alleged unfeasible portions as late as March 31, 1917, and that during the pendency of the suit, he had actually made an appropriation of $2,000 to continue work upon the same portions.

(Division XXIV, Subd. 5, Par. d.)

d. We now direct attention to the lame, impotent, inequitable and untimely method adopted by the defendants to win his law suit. The complaint in this case was filed on June 30, 1917. And as before shown, up to that minute there can be no question but that Tracts A and B were portions of the Yuma Project; and the only evidence in this case that, by any hook or crook by the ipse dixit of the Director, or otherwise, they have ceased to be a part of the project, is defendants' "Exhibits 3 and 4" (Rec. 396-398) which, we respectfully submit, do not, and do not purport to, eliminate such portions from the project, or to in any way declare or determine that any portion of the Yuma Project is feasible or unfeasible (defendants' "Exhibit 2" was rejected, on our objection; but seems to have been admitted under Rule 46). A mere glance at those exhibits will show that they simply purport to restore to the public domain certain lands that had heretofore been withdrawn from entry under the provisions of the Reclamation Act. And to show how meaningless such purported RESTORATIONS were, we point to the fact that one of our plats, "Exhibit 5" we believe (not in the Record, but here for inspection), will show that the greater portion of the land purported to be restored were patented many years before the Reclamation Act became a law. Take for instance Twp. 8 S., R. 22 W., as shown on page 397 Record, and just to give a few examples, the SW¼ of Sec. 26 was patented to Frank L. Ewing on November 21, 1894; the S½ of Sec. 28 was patented to Richard R. Wheeler on February 8, 1892; and the N½ of Sec. 34, (except one 40) was patented to John Dodd on Novem-

ber 16, 1891. And yet it is seriously contended that those two instruments, defendants' "Exhibits 3 and 4," actually had the double effect of rescinding the contract of May 31, 1906, and eliminating all of the Gila Valley from the Yuma Project. A mere statement of the facts suggests the absurdity.

e. The Secretary of the Interior not having, in fact, eliminated Tracts A and B, or attempted to eliminate them, so far as the evidence in this case discloses, it is unnecessary; we believe, to discuss his right and power to do so if he had made such an attempt. But it will, of course, be seriously urged here, notwithstanding the apparent absurdity of the contention, that the Secretary did have such power, and that he actually exercised it; and, in anticipation, we urge that the Secretary, like a private individual, HAS NO POWER to RESCIND or MODIFY a CONTRACT without the consent of the other party; and that he having, on May 10, 1904, determined the Gila portions of the Yuma Project to be practicable and advisable, and having continued to so determine, up until December 4, 1916, when he made his 15th Report to Congress, HE HAD EXHAUSTED HIS POWER in that regard; and he and his employes are, and of right ought to be, estopped to, untimely, inequitably and in bad faith, speak and act differently for the sole purpose of attempting to prejudice the adjudication of this case.

(Division XXIV, Subd. 5, Par. f.)

f. But it has been, and will be, no doubt, contended that Par. 3 of the contract (Rec. 44) gives to the Secretary the power to eliminate Tracts A and B. If that paragraph is intelligently read with a view of putting the whole instrument into effect, which of course, it should be, it will not bear the interpretation that it was ever contemplated by the parties, or that it is in the contract, directly, or indirectly, expressed or impliedly, that the Secretary may at any time, and by a stroke of his pen complete the project by striking therefrom 20,000 of its fairest acres. Paragraph 3 of the contract has to do, not with the question as to whether certain canals, levees and drainage ditches may be constructed over, upon, or around certain acres of land, and whether or not their construction is practicable and advisable from a financial standpoint; but had to do with that particular lands may, or may not, be irrigable because of the existence, or non-existence, of WATER RIGHTS therefor, based upon the amount of water then appropriated therefor, and the amount to be thereafter appriated therefor, measured and limited by beneficial use. Par. 3 is so plain on that as to need aid from no other portions of instrument. "The Secretary shall determine the number of acres so capable of irrigation aforesaid (Rec. 44) How capable of irrigation? By the amount of water appropriated and to be appropriated, and for which water rights exist, of course, his determination to be made upon due and expert consideration of all available data. Available data concerning what? Water rights and water appropriations, of course. And to be BASED UPON, and MEASURED and LIMITED

by the BENEFICIAL USE OF WATER. It speaks for itself. But read the last "whereas" and paragraphs 1, 2 and 3, of the contract, together, and it becomes, if possible, still plainer that water rights, water appropriations, and the beneficial use of water is being dealt with and nothing else.

g. Those are stereotyped provisions in all these kinds of contracts. (See Appendix B, Pamphlet Organization of W. U. Assn.) When our contract was made it had little, if any, application to the Yuma Project, for there was a world of unappropriated water in the Colorado River NOT being beneficially used. But through lapse of time, and the debilitating and destroying effect of "force account," our project not being completed, and but little water being used beneficially on the lands in Tract C for ten years, and practically none on the Gila tracts, other rights became vested by the beneficial use of water in Imperial Valley, California, it may be very well be that, unless the question has been settled by the contract between the United States and the Imperial Irrigation District, testified to by Director Davis and Senator Winsor (Rec. 446 and 537), Par. 3 of the contract will be a live and important part thereof.

h. It has been, and will be, contended also that the reservation in the Pamphlet, plaintiffs' "Exhibit 15" at page 216 of the Record, gives to the Secretary the power to eliminate such vast portions of the project as the 18,000 or 20,000 acres in the Gila Valley. We find this, in:

3rd Ann. Rep. R. S. 192:

"The question of the irrigable acres cannot be stated ABSOLUTELY until the canals and levees are finally

located. It is now ESTIMATED that 97,000 acres will be irrigated in the valley, from which ABOUT 10 per cent must be deducted for sloughs and sand-dune land."

And to the same effect is the testimony of Wm. H. Lyon (Rec. 341). The same processes of reasoning, or unreasoning, which will be used to sustain the contention that the Secretary of the Interior might by one stroke of his pen, eliminate the 20,000 acres in the Gila Valleys, could be used to sustain the absurdity that the Secretary might continue to eliminate acre after acre, and section after section, and township after township, from the Yuma Project, until all should have been eliminated therefrom, and nothing left therein to bear the cost of the construction of the project, but the irrigable lands in he western portion of the city of Yuma.

6.

We believe that we have demonstrated that as a matter of fact, and as a matter of law, the proposed works have not been completed, neither as to Tracts A and B, or C. We again point out that on the day that this suit was filed that there were yet 19 miles of the main drainage canal in Tract C to be completed; and that at the time of the trial of this case there was at least one-third of he main drainage canal to be completed. Therefore, we respectfully insist, that entirely aside from the question as to what charge per acre the lands within the Yuma Project should bear, that we are entitled to a reversal in this case, and that the defendants should be restrained from shutting off our water; and that the purported Public Notice of April 6, 1917, should be declared null and void for all purposes whatsoever.

(Division XXV, Pars. a and b.)

## XXV.

## THE LOWER COURT ERRED IN DISMISSING PLAINTIFFS' BILL.

We have now reached appellants' 25th Ground of the First Specification of Error, attacking the final decree of the Trial Court (Rec. 564) dismissing our bill and our suit, and denying us the relief prayed for, which we respectfully insist was error for all of the reasons set forth in the foregoing argument, Divisions I to XXIV. We might, we believe, submit this ground of Error by simply referring to all of the preceding Argument, but we offer the following:

a. We respectfully submit that the decree is unsupported by the evidence, as is particularly shown in Divisions XXIII and XXIV of this Argument; all of which are here respectfully referred to and resubmitted; and that such decree could only be entered by entirely ignoring the provisions of the contract, plaintiffs' "Exhibit C" (Rec. 41). And there can be no doubt of the irreparable injury sought to be inflicted upon us by the defendants if we are right in our contentions. It needs no argument to prove that water is the very life of land in the vicinity of Yuma, Arizona. Even if the appellees' theory of the case, that $75 per acre is a proper and legal charge to be levied upon our lands, and that the project, so far as the Gila portions thereof are concerned, is constructively completed, is sound, yet to require us to pay the first installment of the construction charge many years prior to the completion of the main drain in Tract C, is inequitable and wrong.

b. It is inequitable and wrong for the decree, by denying us any relief, to compel us to pay a charge of

$75 per acre, instead of the $35 per acre, or MATERIALLY LESS, for which the Chief Engineer, with his universal power and authority (see Division XXIII, Subdivision 3, Par. d, of this Argument, supra), promised us the project could be completed, on May 28, 1904 (Rec. 266). That the ESTIMATED COST, and not the ACTUAL, or the COMPUTED cost, should be returned to the Reclamation Fund, we believe that we have shown in Divisions XVII, XVIII, VIX, XX, XXI and XXIII of this Argument, all of which are respectfully referred to and made part of this paragraph.

c. From the evidence set forth in subdivision 3 of Division XXIV of this Argument, supra, we contend that the plaintiff Archie J. Griffin, and the landowners in Tract A, for whom he sues, are just as much entitled to relief as any of the other plaintiffs.

d. That the homesteaders are entitled to the relief specially prayed for by the corporate plaintiffs, we believe we have shown by our Argument in Division XVI hereof, which is respectfully referred to and made part of this paragraph.

e. Again we say that there can be no doubt, if our contentions are right, either as to the charges per acre we should be required to pay, or to the contract not having been completed; that as to the completion of "the proposed works" that the defendants were proceeding inequitably and wrongfully to our irreparable injury, and they should be perpetually enjoined from so doing In support of that we offer all of the arguments heretofore advanced in Paragraphs a, b, c and d of this Division.

f. Right or not, in our other contentions, there can

be no doubt of the inequity and the unconscionableness of contract, the Water-Right Application, Plttfs' "Ex. D" (Rec. 48-55), which the defendants were threatening to compel us to execute and deliver to them before we could secure water; and in support of that we offer all the arguments heretofore urged. In any view of the case, Section 8 of the Water-Right Application (Rec. 53), is an attempt to compel us to convey our property to the United States without compensation, in violation of the Constitution. In the consideration of the greater questions at issue in this case the wrongfulness and inequity of that paragraph has been overlooked. There were some avowals made in open court during the trial and some of the wrongful and unconstitutional provisions would be stricken therefrom, but those avowals are rather hazy, and the only way to have them put into full force and effect is by the reversal of the decree, and the judgment of this Court that no such provisions should ever be placed in any contract tendered to the plaintiffs, as a prerequisite to secure a water supply for their lands.

g. We respectfully contend that on all of the evidence, all the law, and according to the plainest principles of equity, the decree should be reversed, and that the plaintiffs should have all the relief prayed for.

XXVI.

Our 26th Ground of the First Specification of Error is simply the converse of our 25th Ground; and all the arguments that have been urged in the preceding Division XXV in support of our 25th Ground, are here respectfully referred to and made part of this Division. For it necessarily follows, that if the Trial Court

erred in dismissing plaintiffs' bill, that it erred in refusing us the relief prayed for in the Bill of Complaint.

## XXVII.

## THE ERRORS PECULIAR TO THE CIRCUIT COURT

In our Second Specification of Error, and on three grounds, we attack certain special expressions of the Circuit Court of Appeals as set forth in its Decision (Rec. 632), which we believe are erroneous.

### I.

The First Ground complains of the finding and decision of the Circuit Court to the effect that the Public Notice of April 6, 1917, was given in clear accord with the Statute. That, of course, we take issue with; but argument thereon would lead to a repetition of all that we have before set forth in Division XXII, supra; and all that we have set forth as to the meaning of "thereupon" as used in Sec. 4 of the Reclamation Act. Evidently the Circuit understands "thereupon" to mean 13 years thereafter, else it would not have found that the Notice of 1917 was given in clear accord the statute. We trust this Court, from a reading of the Statute and a consideration of what was sought to be accomplished thereby—so that the settlers and landowners might be advised in advance as to the cost of the Project, as set forth in the speech of Mr. Mondell, Subd. 3, Div. XIX, page 103 supra; Report of Congressional Committee, Senate Document 719, 61st Cong. 3rd Session, page 120 supra; and the opinion of Judge Dietrich, 263 Fed. 738, page 123 supra—will not come to the conclusion that the Public Notice of 1917 was given in CLEAR accord with the Statute.

(Division XXVII, Subd. 2 and 3.)

2.

The Circuit Court finds that our contention that Project was not finished and that the time had not arrived at the trial of the case for the commencement of the payment of the installments of the Cost, is of no real importance. That is almost adding insult to injury. The contract of May 31, 1906, calls for the "completion of the proposed works" before we begin paying. It is admitted that 20,000 acres of the Yuma Project has not been finished—hardly touched; and the uncontradicted evidence and the officials Reports of the Secretary of the Interior shows conclusively that on the day we filed this suit only three miles of 22 miles of main drainage canal, a substantial part, indeed, of "the proposed works" had been built; and that only one half of the same drainage was completed at the time of the trial. We do not mean the drainage system as a whole. but the main canal itself as marked upon Pltffs' Exhibits 15 and 26. We respectfully insist and urge that point is of real, tangible, first importance; and we did feel, fully appreciating the stupendous volume of business before the Circuit Court, and with profound respect for its learning and ability, that that point of ours was entitled a little more careful consideration than the curt and, we believe, erroneous expression thereon indicates it received. We respectfully refer back to Division XXIV hereof.

3.

The Third Ground of the Second Specification of Error is really but a repetition, as directed to the particular Decision and Decree of the Circuit Court of Ap-

peals, of the 25th and 26th Grounds of the First Specification of Error, and all arguments urged in support of these Grounds are hereby respectfully referred to and made part of this paragraph.

CONCLUSION.

(a) In finally submitting this case, we feel that we in many things owe an apology to the Court for the many imperfections of this brief, in intellectual design and execution, and mechanically, not the least of which is its great length, and many iterations. For instance, the question of the Public Notice, and whether one was ever issued at all or not, we deem of "no real importance" in the final determination of this case; for, as we have heretofore, successfully, we believe, contended, whenever the Public Notice was, or should have been, issued, it should contain as the charge to be levied upon our lands the amount of the ESTIMATED COST, and no more. Yet, owing to the firm and overpowering grip that defendants' theory concerning the Public Notice had upon the minds of the learned and conscientious Judge of the Trial Court, and the Judges of the Circuit Court, we deemed it wise to, at great length, in Division XXII of this Argument, exhaust, as we see it, the question of the Public Notice.

b. In determining the meaning of the words "estimated cost" we appeal to this Court to place itself in the position that Congress was in when it heard the prophetic language of the Minority Report of the House Committee on Arid Lands, H. Doc. 794, Part 2, 57th Congress, First Session, set forth in

Vol. 35 Cong. Rec. p. 6693,

a portion of which is set forth herein in the XIX Divis-

ion of this Argument; and when it heard the speeches of Senator Hansbrough and Mr. Mondell, excerpts of which are heretofore set forth in the same Division; also place itself in the position of the venerable Secretary of the Interior, E. A. Hitchcock, when he in the years 1903-4 and 5, in the 2nd, 3rd and 4th Reports of the Reclamation Service to Congress, at pp. 30, 31 and 21, respectively, so glowingly described the wisdom and utility of Sec. 4 of the Act in requiring that only the ESTIMATED COST should be returned to the Reclamation Fund; and in the place of the Joint Congressional Committee, headed by Senator Root, which reported to Congress that some discrepancies between the ESTIMATED and ACTUAL cost were unavoidable, but that the difference between $20 and $39 per acre was unjustifiable—as we contend that the difference between "materially less than $35 per acre," and $75 per acre, is unjustifiable.

(c) In construing the contract we appeal to the Court to consider the position of the plaintiffs and their predecessors in title in the year 1904, when we were induced to mortgage out lands "to secure the repayment of the estimated cost of the construction;" and that we had the advice of the ablest counsel in the great Southwest, Judge Joseph H. Kibbey, of Phoenix, Arizona, whose construction of the law, timely arrived at 16 years before the original decision in this case, was diametrically opposed to the conclusions of the Trial Judge in this case; and to consider that we entirely believed in, and relied upon, the oral promises of the Chief Engineer, who was, for all practical purposes, the Secretary of the Interior himself (see Par. d, Subd. 3, Div. XXIII,

of this Argument p. 172, supra), and that if we had not believed in and relied upon those promises we would not have mortgaged our lands to secure the payment of the estimated cost; and would probably have gone with the Colorado Delta Company in pursuance of the plan outlined in plaintiffs' "Exhibits 17 and 18" (Rec. 243-5): And they we ask the Court to

> "so far as possible put itself in the place of the parties when their minds met on the terms of the agreement, and then from a consideration of the writing itself, of its purpose, and of the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do, upon what sense and meaning of the terms they used, their minds actually met."
>
> Amer. Bond. Co. vs. Pueblo Invest. Co.,
> 80 C. C. A. 97,

reading at page 107, and the cases there cited.

d. And in determining whether the Yuma Project is completed, as provided in the contract, we ask the Court not to be misled by the stupendous and impossible fictions of Director Davis, that by some unheard of and unauthorized mental operation of his, the Gila portions of the Yuma Project had been eliminated therefrom; and to consider the evidence heretofore set forth in the subdivision 3 of Division XXIV hereof, showing how frequently, and in how many different ways, Director Davis himself had officially declared to Congress and otherwise, that the Gila portion of the project was practicable, advisable and feasible; and to consider the simple fact that when this proceeding was instituted that less than three miles of the main drainage in Tract C had been completed; it being an integral and substantial por-

tion of "the proposed works," as stipulated in the contract; and again we point out to the Court that we are not, as a prerequisite to commencing payment for the project, asking for rock revetments, and other expensive works; we are simply asking that "the proposed works" be completed simply and cheaply of earth, excavated and put in place by mule teams and scrapers as originally stipulated.

e. The appellants, simple farmers, have come to this Court believing that it is the fountain of justice, and that they will receive it by the reversal of the concurring decrees of the two lower courts. We are profoundly convinced that if we do not prevail here, it is because the law will not permit us; and that we shall not lose because of any feeling on the part of this Court, or any of its members, that the King can do no wrong; and that we should not win simply because we are, in effect, contesting with the Government itself; and that it should not lose, simply because it is the Government, even though it should be in fault through the neglect and inefficiency of its agents and employes; all of which, we are frank, to say, seemed to us to animate the Lower Courts. We are entirely dissatisfied, nay, almost utterly disgusted, with some of the reasons, and we we almost dare to say, the lack of reasons, advanced below for the adverse decisions. We feel, even if we should lose here, which we do not anticipate, that when this Court shall have, as is its invariable custom, expressed its views, lucidly, painstakingly and reasonably, justice shall have been done and the law properly

administered, and we shall bow to the decision. But until then we shall feel that we were in 1904 the victims of a confidence game put over upon us by our own Government, which we dearly, truly and loyally love; and that that confidence game has been given ruinous effect by the concurring decisions of the Lower Courts.

We, therefore, respectfully urge, and pray, that the concurring Decrees of the Lower Courts be reversed, and that the Appellants have the relief prayed for in their Bill of Complaint; either by the judgment of this Court, or directions to the Lower Courts, as this Court shall deem just and equitable.

THO'S. D. MOLLOY,
Counsel for Appellants.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, et al, appellants,
*v.*
W. W. SCHLECHT AND DAVID C. CAYLOR. } No. 268.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR APPELLEES.

### THE STATUTE INVOLVED.

Section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 389), reads:

> That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the

> reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

The plaintiffs contend that on May 10, 1904, the Secretary of the Interior gave the public notice therein required, assessing a charge of $35.28 per acre (7). The defendants, on the contrary, contend that the charges were not fixed until the issuance of the public notice of April 6, 1917 (469), at which time a construction charge of $75 per acre was imposed.

## THE PLEADINGS.

The pleadings, which are inordinately long, can be briefly summarized. The plaintiff corporation was organized in 1903 (142), with power to contract with the United States with reference to the collection and payment of charges imposed under the Yuma project against the lands in what is known as the Lower Colorado Irrigation District. This district, the bill alleges (5), comprises three main areas, designated as tracts A, B, and C, shown on the map at p. 40. The bill proceeds on the theory (7) that the Secretary of the Interior, on May 10, 1904, determined that the irrigation of all these tracts was practicable and advisable, and accordingly caused contracts to be let for the construction of the Laguna dam across the Colorado River, and of levees along the banks of the Gila and Colorado rivers; that he determined and estimated the cost at $35.28 per acre, and gave public notice to this effect; that he thereupon set aside $3,000,000 for construction; gave public notice of what lands were irrigable under the project, tracts A, B, and C being included; and that the payment of the annual instalments, ten in number, would begin on the completion of the project. The plaintiff corporation was organized, at the suggestion of the Secretary, by the owners of private lands within the district, for the purpose of negotiating with the Secretary, under the provisions of the Reclamation Act, to secure government aid; and that the shareholders, by becoming members, mortgaged their lands as security

for the payment of the estimated cost and charges; that about May 28, 1904, the various landowners, relying on statements of the reclamation officials that the project would be completed within two years, at a cost of $35.28 per acre, became shareholders, and thereby mortgaged their lands to secure this cost; and that they would not have done so if they had known that the cost would exceed this amount. It is alleged that the Secretary, from surveys made, determined that the construction of the project, including levees and a drainage system, was practicable and advisable; and that certain officials, duly authorized by the Secretary, promised the landowners, on May 28, 1904, that the project as a whole would be completed at a cost of $35.28 per acre; and that all of tracts A, B, and C would receive water. It is then alleged that on May 31, 1906, the United States entered into an agreement (14) with the plaintiff corporation, to the effect that the estimated cost should be divided into not less than ten annual instalments, the first to be payable on completion; that the cost should be equal throughout the district; and that this plaintiff guaranteed the payments.

It is then alleged that tracts A and B have been wholly eliminated from the project, and that no drainage system has been constructed for tract C, with certain exceptions, although one is necessary; that a drainage system for that tract is in process of construction but can not be completed short of two and one-half years; and that 44 per cent of the project remains uncompleted.

It is then alleged that during the process of construction the Government acquired two private irrigation systems, from which it has been supplying certain lands with water until its own project could be completed; that notwithstanding all of the foregoing, the Secretary, on April 6, 1917, wrongfully issued a public notice imposing a charge of $75 per acre on the lands in tract C, upon the theory that the project is now completed and that the time for payments is at hand, notwithstanding the fact that the contract of May 31, 1906, provides that the charges shall be equally assessed on all of the lands within the district, including tracts A and B, as well as C, and notwithstanding the fact that the drainage system is still uncompleted as to tract C, to say nothing of the entire elimination of tracts A and B. It is then alleged that the landowners, under the public notice of April 6, 1917, are given the option to initiate a water right, by using a written form drawn by the Secretary, to be signed not later than December 31, 1917, under which the landowners obligate themselves to pay $75 per acre; and that the Secretary has given notice that unless they sign by the date just mentioned, no more water will be furnished; that the landowners are dependent upon water; and that if the Secretary carries out his threat, they will be unable to get water from any other source and their lands will be destroyed. The bill seeks an injunction to enjoin these alleged unlawful acts.

With respect to the answer, it is sufficient to say that it is founded upon the theory that the Secretary of the Interior did not give any public notice under §4 of the Reclamation Act until April 6, 1917; that in imposing a charge of $75 per acre, the Secretary is acting lawfully; and that inasmuch as the bill of complaint is founded on the erroneous theory that a charge of $35.28 per acre was imposed in 1904, the suit must fail.

## THE FACTS.

Soon after the passage of the Reclamation Act of June 17, 1902, the Secretary of the Interior caused surveys to be made to determine the feasibility of the Yuma project. These surveys were considered by a board of consulting engineers, who, on April 8, 1904, drafted a report which contained their estimate of the cost of constructing the project (164). They considered certain alternative propositions, a cost estimate being made as to each. Their plans contemplated the erection of the Laguna dam on the Colorado River, and the construction of a canal on the Arizona side of that river, which in its course would cross the Gila River, which flows into the Colorado River near Yuma, 15 miles below the dam. Under date of April 8, 1904, the board, in transmitting their report to Newell, the chief engineer, stated that the lands on the Arizona side are mainly in private ownership and that the estimated cost is so great that the project is not feasible unless all of the land comes in. They call attention to the fact that small portions are held in quantities exceeding

160 acres, and they consider it necessary that these owners guarantee to dispose of their excess acreage in order to make full compliance with the Reclamation Act. They recommend that when these conditions, as well as others, have been complied with, construction be commenced under the general plans prepared, subject to such modifications as may be made in the future by consulting boards, and that the Secretary set aside $3,000,000 for this purpose.

### THE MEETING OF THE ENGINEERS WITH THE BOARD OF GOVERNORS AT YUMA, APRIL 8, 1904.

The board of governors of the plaintiff association, as well as a large number of farmers in the valley, met with this board at Yuma on this date. The engineers told these people that the construction charges would be about $35 per acre, and that all persons holding land in private ownership in excess of 160 acres would have to deed the surplus in trust to the association, to be sold to others when the project was completed. The farmers expressed doubts as to the land being able to bear $35 per acre, but the engineers informed them that they had recommended the construction of the project notwithstanding this cost (238, 239). As already stated, the board wrote a letter (235) to Newell, chief engineer, apparently after the meeting was over, transmitting their report (162–168) containing an estimate of the cost of certain alternative plans. A copy of this letter was handed to the farmers (234). In this letter the board state that they have examined the plans and

estimates, etc.; that they approve of the general plan submitted, but have directed further investigations to consider an alternative crossing of the Gila River; that in their judgment it is necessary that the lands in the Indian reservation (on the California side of the Colorado River) bear their part of the cost; that, owing to the great cost, it is necessary that the privately owned lands on the Arizona side join in the project; that owners of more than 160 acres should dispose of the surplus; and then they continue:

> When the conditions above outlined have been complied with, we recommend for construction the Yuma Project under the general plans prepared, *subject to such modifications as have been or may be in future made by consulting boards.*
>
> To this end we recommend that Mr. J. B. Lippincott be instructed to proceed with the preparation of detailed plans and specifications for the project, and that the Honorable, the Secretary of the Interior be requested to give his general approval to the Yuma Project, and that the sum of $3,000,000 be set aside in the reclamation fund for the construction thereof, subject to the fulfillment of the above-described requirements.

### THE MEETING OF THE FARMERS AT TULE LAGUNA, MAY 2, 1904.

The next step was the calling of a meeting of the farmers at Tule Laguna, in the Yuma valley, to discuss the project. This meeting was held on May 2,

1904. It was a debatable question whether the farmers should go ahead. Some private canal companies had been supplying them with water, although not in a very satisfactory way, and a new company, known as the Colorado Delta Canal Company, composed of San Francisco capitalists, was preparing plans to build a canal of its own with which to supply the farmers with water from the Colorado River at a cost of $15 per acre (240, 246). It was the consensus of opinion, however, that it was better to join hands with the government (246).

**MATTERS OCCURRING BETWEEN THE MEETINGS OF MAY 2, 1904, AND MAY 28, 1904.**

Accordingly a letter, dated May 3, 1904, was sent by the plaintiff's officers to the Secretary (247) (printed, p. 213), transmitting: (1) a copy of its articles of incorporation; (2) a petition, also dated May 3, 1904, urging the Secretary to go ahead (248); and (3) resolutions of similar tenor passed by the city council of Yuma and the Yuma board of trade (215).

On May 9, 1904, Walcott, the Director of the United States Geological Survey, addressed a communication to the Secretary of the Interior (199). After calling his attention to the act of Congress of April 21, 1904, authorizing the Secretary to divert the waters of the Colorado River for the reclamation of certain Indian lands in California; the fact that extensive surveys and examinations as to the possibility of diverting the waters of that river have already been made under the Reclamation Act of

June 17, 1902; and to the report of the board of engineers of April 8, 1904; the letter goes on:

> In general the reports indicate that by means of construction of a dam across Colorado River and other works it will be possible to reclaim upwards of 85,000 acres of land at a cost of less than $40 per acre.
>
> * * * * *
>
> The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is believed that the cost of $40 per acre is not prohibitive.
>
> There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending.
>
> *Recommendations.*
>
> In view of the present condition of knowledge of the project I respectfully recommend that the sum of $3,000,000 be set aside of the reclamation fund, for the construction of the Yuma project subject to the satisfactory adjustment of various matters pertaining to land and water titles and to structural features.

Under date of May 10, 1904, the Secretary replied (204):

> It appears that under the Yuma project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of less than $40 per acre. * * *
>
> Your recommendation is that the sum of $3,000,000 be set aside from the reclamation fund for the construction of the Yuma project, *subject to the satisfactory adjustment of the various matters pertaining to land and water titles and to structural features.*
>
> In compliance with your recommendation, I hereby set aside the sum of $3,000,000, or so much thereof as may be necessary, from the fund provided by the act mentioned, for the construction of the Yuma project, *under the conditions you have set forth.*

Under date of May 16, 1904, a communication was addressed by Newell, chief engineer, to the Yuma County Water Users' Association, acknowledging receipt of the letter of May 3, 1904, and the accompanying papers (215). This letter was not received until printed in pamphlets which came to Yuma by express on May 28, 1904 (249), under circumstances presently to be related. On May 10, 1904, at Los Angeles, Lippincott, the supervising engineer, wrote (250) to Bondesson (plaintiff's secretary in 1904; p. 229) at Yuma, in which he says that he sent him that morning the following telegram (250):

> Secretary has allotted three millions for Yuma project conditional on satisfactory

> organization of irrigators and signing of contracts with them. Proposition now entirely dependent on irrigators. Write progress of organization to me and state if arrangements have been made with Kibbey.

The letter then goes on to suggest that arrangements be made by telegraph for Lippincott to meet the plaintiff's officials at Yuma at an early date.

On May 14, 1904, at Los Angeles, Lippincott again wrote the Yuma County Water Users' Association as follows (254):

> I am pleased to be able to officially inform you that the Secretary of the Interior has made an allotment from the Reclamation fund available for the construction of the Yuma project. He has set aside $3,000,000 for this purpose.
>
> About a month ago I prepared for Mr. F. H. Newell a statement which I desired he should make to you in a general way descriptive of the works which we contemplate constructing. At that time he did not think it proper to issue this statement and advised waiting until the Secretary of the Interior had taken action in the matter. He now informs me by wire that I may issue this statement. I have it practically written and prepared to send to you, accompanied by maps and drawings. This statement is to be issued in connection with the negotiating with various landowners to sign agreements with your Water Users' Associations.

The letter also makes suggestions with respect to meeting Newell at Yuma on May 27, 1904, and to

the printing of the pamphlet, the statement being made that it would mean months of delay if done at the Government printing office at Washington; that Lippincott has no appropriation of his own available for this purpose; but that he will have the pamphlets printed at Los Angeles if the plaintiff will bear the expense. The statement which Lippincott in his letter says he prepared for Newell to sign is the reply of May 16, 1904, already mentioned, to the Yuma County Water Users' Association's letter of May 3, 1904, to the Secretary of the Interior. It will presently be mentioned again.

On May 17, 1904, at Los Angeles, Lippincott again wrote Bondesson, at Yuma, with respect to the suggested meeting (257). Accordingly, Lippincott, the supervising engineer, went to Yuma on May 27, 1904, accompanied by Newell, the chief engineer, by Bien, a legal adviser, and by Hall and Hamlin, consulting engineers (259–260).

**MEETING WITH THE BOARD OF GOVERNORS AT YUMA, MAY 28, 1904.**

On the forenoon of this day the officials last mentioned met with the plaintiff's board of governors, and expressed surprise that the pamphlets had not arrived. Accordingly, Bondesson went down to the express office at noon and got the package (261, 263). The purpose in getting the pamphlets was to distribute them among the farmers, nearly all of whom were in town that day (263). This pamphlet (Ex. 15) is printed in the record at page 213. It contains

three letters which have already been referred to, namely: (1) the letter of the Yuma County Water Users' Association to the Secretary of the Interior, dated May 3, 1904; (2) the reply of May 16, 1904, signed by Newell, chief engineer; (3) in which he incorporates as a part of his reply the Secretary of the Interior's letter to the director of the geological survey, dated May 10, 1904, setting aside $3,000,000 for the construction of the project.

Attention is now directed to the reply of May 16, 1904, signed by Newell, chief engineer, set forth in this pamphlet. It contains this paragraph:

> In reply to your request for information as to cost and character of works projected for your locality, the following general statement is presented. The Secretary reserves the right to make *such revisions in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare* (216).

It deals with the areas to be irrigated under the project; with the head works; with the canals; with the Gila crossing; with the levees; and with the drainage systems. In summarizing it is said:

> The entire cost of this enterprise, providing all the area is irrigated which is indicated above, will amount, according to the estimate, to about $35 per acre irrigated. It is entirely possible, however, that as this construction work proceeds this cost may be somewhat increased or lessened, although an effort has been made to cover all contingencies, and the

> estimates of cost have been liberal. The price will range near $35.00 per acre, this to be paid for according to the provisions of the Reclamation Act and regulations of the Secretary of the Interior, in ten annual installments after the first delivery of water. The annual charge for maintenance and supervision of this system will be very low and probably materially less than $1.00 per acre. There will be no charge for interest, profit, or taxes (224-25).

It also contains a statement that it will be necessary for all of the landowners of the district in Arizona to enter into an agreement with the Secretary of the Interior, through their local water users' association, for the payment of the water when delivered (225).

The minutes of the meeting of the board of governors held in the forenoon were read in evidence to show what transpired, but they disclose that only general statements were made by the reclamation officials (261–263).

Bondesson was requested by either Newell or Lippincott to distribute the pamphlets among the farmers, which he did (263). The landowners were in town that day, a mass meeting having been called for that evening, which had been extensively advertised, to decide whether or not the owners wanted Government irrigation and upon what terms they could get it (263), and the pamphlets (Ex. 15) were circulated among them (264).

THE MASS MEETING AT YUMA ON THE NIGHT OF MAY 28, 1904.

The mass meeting was held in Elks Hall, at Yuma, at 8 o'clock in the evening, the pamphlet being distributed to the people who came late and who had not received a copy during the day (264–5). The president of the water users' association presided, and Newell, Lippincott, Hall, Smythe, and Judge Kibbey, afterwards Governor of Arizona, all spoke (265). Newell stated that he represented the Secretary of the Interior and purported to speak for him. He said in substance that it would require about two years to finish the project from the time the contracts were let; that they were practically ready to let the contracts as soon as the landowners had signed subscription agreements; that the estimates were ample; that they would underrun rather than overrun the estimated figure mentioned in the pamphlet; that the cost would be materially less than $35 in his opinion; and that this figure allowed for everything (265–266).

Lippincott said that they were anxious to get started on letting the contracts for the dam, the completion of which would require the longest period of time; the dam was the key to the entire situation, but that while it was being constructed the rest of the work would go on, so that when the dam was finished the water would be ready; that the dam could be successfully built; that the project would be in every way a desirable one; that it could be constructed within the limit of the estimates; and that

he staked his reputation on this. The people were urged to get busy with the subscription contracts (a sample will be found at p. 209, Ex. 14). These subscription contracts had already been printed for this purpose, and Bien suggested that, in addition to what was already there, a line should be inserted requiring each landowner to sign the articles of incorporation in addition to the contract, and a large number did so (266–268).

A large number signed that night immediately after the meeting broke up, approximately 10,000 acres. A campaign to get all the owners to sign was inaugurated, with the result that about 98 per cent of the private lands had signed up by August, 1904 (268). The pamphlet was used for this purpose (269). This pamphlet was accompanied by a map, and Lippincott also produced for the board of governors at the meeting on the morning of May 28, 1904, a map on a larger scale. It is an enlargement of the map printed in the pamphlet, and both Lippincott and Newell said that it was made to represent the complete plan of the project as nearly as it could be represented on a map (271). This map (Ex. 26) was received in evidence (271).

Bondesson, whose subscription agreement was received in evidence (274), said that he relied upon the statements that were made during the day and also those contained in the pamphlet as to cost and the time when he would get water; and that if he could have foreseen that the project would cost more than $35, or possibly $40, he would not have

signed (275). After the landowners began to sign up, the ownership of the private lands was constantly changing (276). Probably 85 per cent of the land has changed hands, only 15 per cent of those who were owners on May 28, 1904, now retaining title (281). But the same representations as to the cost of the project and the time of its completion were made by the sellers to their vendees (278, 279).

Several witnesses gave testimony similar to that just mentioned as to the statements made at this meeting by Newell and Lippincott (329–332; 340–342; 345–346; 353–354).

These witnesses also stated that they relied upon the representations, and were induced to sign the subscription contracts because of them (333; 341-342; 347; 354).

### THE INFORMATION IMPARTED TO LIPPINCOTT AS TO THE RATE AT WHICH THE LANDS WERE COMING IN.

After the meeting of May 28, 1904, Bondesson was in constant communication with Lippincott's Los Angeles office relative to the obtaining of signatures to subscription contracts. Lippincott wrote to the officials of the Yuma County Water Users' Association on this subject under date of June 13, 1904 (282); July 30, 1904 (283); August 17, 1904 (284); and September 27, 1904 (286).

### THE DATE CONSTRUCTION BEGAN.

J. G. White & Company were awarded the contract for the construction of the Laguna dam in June, 1905, for $797,650 (428). They began work in July, 1905,

and carried it forward with varying success until they found they were losing money. The conditions were more difficult than expected, and the chief engineer of the Reclamation Service appointed a board of engineers, who visited the dam in August, 1906, and found that conditions were materially different from those expected (379). The contractor was unable to get any more money from his bankers, and was threatened with bankruptcy. Accordingly he was permitted to abandon the work in January, 1907. The dam was about one-third completed at this time (419, 420). The Government thereupon took the work over (419) and operated the same by a "force" account. By the fall of 1907 it was about one-half completed (420).

THE CONTRACT OF MAY 31, 1906, WITH THE YUMA COUNTY WATER USERS' ASSOCIATION.

This contract was drafted in 1904, but there was a delay in getting it executed because certain features were sought to be injected (317). As finally executed it bears date May 31, 1906 (41). In the fall of 1906 it was submitted to a vote of the water users (317). In this connection it is to be noted that the articles of incorporation (1903) of the plaintiff company define in § 3 of article 4 (145, 146) the lands embraced within the lower Colorado irrigation district. Roughly speaking, they comprise tracts B and C. The articles were amended on May 23, 1906 (162), § 3 of article 4 being broadened so as to include tract A (161). The contract of May 31, 1906, pro-

vides, in paragraph 4 (44), that payments for water rights to be issued to shareholders shall be divided into not less than 10 equal annual installments, and that the cost per acre shall be equal throughout the entire district, which is defined as comprising the lands described in the original articles of incorporation, and the amendment thereto already referred to. Paragraph 3 (44) provides that water rights shall not be issued in excess of the acreage capable of irrigation. The Secretary of the Interior is to determine the number of acres capable of irrigation, upon due consideration of all available data, etc. The Yuma County Water Users' Association agrees that it will promptly collect payments, etc., and guarantees the payment of that part of the cost which *shall* be apportioned by the Secretary of the Interior to its shareholders. Paragraph 11 (47) provides that nothing contained in the agreement shall be construed as an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation of the association in all their details as the form of organization of water users contemplated and authorized by § 6 of the Reclamation Act of June 17, 1902.

It will be noted that this contract contains no specific description of the lands to be irrigated under the Yuma project; and is absolutely silent as to the cost per acre to be imposed. The position of the plaintiffs, both in the pleadings and during the trial, was that the Secretary of the Interior had determined the charges on May 10, 1904, and that the charges thus fixed should be read into the contract of May

31, 1906 (231). The contract, however, in terms recognizes that the charges have *not* yet been fixed, but are to be fixed in the *future*. (Par. 5; p. 45.)

CHANGES IN THE PLANS AS THE WORK PROGRESSED.

At the time of the meeting of May 28, 1904, there were no surveys or locations which anybody regarded as permanent; only approximate locations of some features, the principal one being the Laguna dam. But even that was subject to change, not only in location but in design; and as a matter of fact its design was substantially changed as well as its location (385–6; 423). The report of the board of engineers of April 8, 1904, contains no estimates as to the cost of the type of dam that was actually built (424). As already stated the contract for the construction of the dam was let to White & Company in June, 1905, to be constructed in two years (435; 437), for $797,650 (428). Owing to unexpected difficulties that company was faced with bankruptcy, and as a result was released from the contract and the Government itself took over the work in January, 1907 (465; 419–420). When finally completed it cost approximately double the original estimate (420), and possibly even as much as $2,100,000 (450), there being no accurate testimony on the subject.[1] The reasons for the heavy increase in cost were explained in detail (380–385; 420).

[1] This matter, however, is cleared up by the annual reports of the reclamation service. According to the 8th annual report, the dam was completed March, 1909 (p. 55), at a cost of $1,640,787.90 (p. 57). The total amount expended on the entire project up to June 30, 1909, was $3,225,425.33 (p. 58). According to the 16th annual report, the amount expended up to June 30, 1917, was $8,387,641.24 (p. 68).

The original plans contemplated a main canal on the Arizona side of the Colorado River, which would cross the Gila River. But the plans were changed in order to make a better and more endurable project. The ravages of the Gila River might entirely destroy the canal, and accordingly it was constructed on the California instead of the Arizona side, and at a point just below the city of Yuma was carried over to the Arizona side by a syphon under the Colorado River (381, 430), which was completed in 1912 (431). Considerable difficulty was experienced in building it, quicksand being present (457). In order to make possible the irrigation and reclamation of tracts A and B, it was necessary to construct levees along both the Colorado and the Gila Rivers, the project not being feasible without them (529). With this object in view their construction was begun. Lippincott, the supervising engineer, believed in good faith that they could be put in in 1904 (498); and likewise believed that the inclusion of tracts A and B (known respectively as the north and south Gila valleys) was feasible and should be put through (494–5). It was, however, found impossible to control the Gila River by means of levees (390), which was one of the reasons why the canal was changed from the Arizona to the California side (381). Upwards of $600,000 were spent in endeavoring to include tracts A and B (the upper and lower Gila valleys), but the effort was not successful (408; 434–5). Levees were built at places along the eastern bank of the Colorado River and along the north

bank of the Gila River, and possibly some on the southern bank (408, 434–5, 486, 488, 508, 511). Levees have been completed below Yuma on the Arizona side (532). As the work progressed, however, it was found impossible to control these rivers (390–1, 430). One of the Government's witnesses (Davis) said that in his judgment the Gila portion of the project (tracts A and B) should have been eliminated from the start (432). He concluded in 1915 that levees were impracticable (436), and that it was not feasible to irrigate these tracts, although this was not appreciated in 1904 (441). It was unwise to include these tracts even if they had had the necessary money (442). Their inclusion renders the project very hazardous, and the present plans are a decided improvement (482). The Colorado River has broken away towards the Gila River, making almost a complete circuit and thereby invading part of the valley which in 1904 they contemplated irrigating (497). One of the witnesses called by the plaintiffs in rebuttal was, however, of the opinion that levees were entirely practicable, and so recommended when he was employed by the Government on the job (506–526). He, however, admitted that an honest difference of opinion might exist (531). When he left the service in 1915 the leveeing of the Arizona side was abandoned and work was confined to the protection of the existing levees (512). The Colorado River has changed its position materially, at places probably a mile or even more (523).

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IT IS, OF COURSE, UNDISPUTED THAT TRACTS A AND B ARE NOT IN THE PROJECT AS NOW COMPLETED.

This fact is admitted by the pleadings. The theory of the plaintiffs is that these tracts were included in the project at its inception, and that under the contract of May 31, 1906, they must bear their proportionate share of the cost. The defendants, on the other hand, while admitting that they lie in what is known as the lower Colorado irrigation district, contend that it is only those lands within this district susceptible of irrigation that are to pay their share of the cost; and that inasmuch as the Secretary of the Interior has now determined that it is impracticable to include them, there is no reason why the remaining lands should not bear their share of the cost.

THE PROJECT IS NOW COMPLETED.

As already indicated, the bill of complaint is founded on the theory that even if it can be said that the Secretary has the right to exclude tracts A and B from the project, it has nevertheless never been completed as to tract C. Under the contract of May 31, 1906, payments are to be made in ten annual installments, the first at the time of the *completion* of the proposed works, or within a reasonable time thereafter upon due notice by the Secretary of the Interior to the association.

The position of the plaintiffs is that the project is not completed as to tract C because a proper drainage system has not been provided. The plaintiffs intro-

duced testimony that a considerable portion of the main drain and whatever laterals are necessary properly to drain the valley, remain uncompleted (359); also that all of the head gates and works of that character have been built of wood instead of cement, as originally planned (366). The defendants, on the other hand, introduced testimony that a larger mileage of canals was built, approximately four times that originally contemplated, and that it is these canals that contain a large number of small wooden structures (381–2). They likewise introduced testimony that the work of the drainage system can not be carried forward in advance of the needs, because the needs are so various both in location and size that it can not easily be done; that the construction of the drainage canal was begun in the lower valley, and that immediately the people protested on the ground that it was not needed (401–2). The farmers passed a resolution asking that its construction be delayed (407). Drainage must be carried out as conditions develop (403), and the time will never come in the present generation when it can be stated that no more drainage is necessary (404), though in a practical sense the project is now completed (405–6). No considerable area has been rendered nonirrigable by lack of drainage (406), and as a practical proposition the works are now completed (440), at least with respect to the lands that can be irrigated (442). The lands are now the most prosperous and most highly productive per acre project in the reclamation service

(461). Another witness said that he regarded the project, so far as the Yuma valley is concerned as a completed one (482), and gave his reasons at length (489–90). On the other hand, the plaintiffs called a witness in rebuttal who said that he did not regard the project as completed, because the levee system was inefficient and nothing short of complete control of the rivers will do (507).

**THE FINDINGS OF THE TWO LOWER COURTS AS TO THE COMPLETION OF THE PROJECT.**

The district judge, in the opinion which he rendered—under the heading "Have the proposed works been completed?"—found that from a practical standpoint the project was completed on April 6, 1917 (563–564). The Court of Appeals found to the same effect (635).

**EVEN AFTER ELIMINATING TRACTS A AND B THE AREA OF THE LANDS INCLUDED IN THE PROJECT UPON WHICH THE CHARGES OF CONSTRUCTION ARE ASSESSED IS GREATER THAN THAT ORIGINALLY CONTEMPLATED.**

The report of the board of engineers of April 8, 1904, is divided into two parts, the first being an estimate gotten out in March, 1904 (164), and the second being an estimate gotten out in April, 1904 (187). In the March, 1904, estimate the net amount of irrigable land, both in California and Arizona, was fixed at 76,966 acres (168). In the April, 1904, estimate the net amount was increased to 87,449 acres (189). In the reply of Newell, chief engineer, to the Yuma County Water Users' Association, dated May

16, 1904 (which was printed in the pamphlet already referred to), the statement is made that the irrigable lands on both sides of the river, to be brought into the project, comprise 86,700 acres, of which 73,100 acres are in Arizona (217–8). Tract B, which was eliminated from the project, contains between 6,000 and 7,000 acres (361). There is apparently no evidence in the record as to the area of tract A.[2] Bondesson, when asked its acreage, stated that he did not know, but that the area had been decreased since 1904 by the ravages of the Colorado and Gila rivers (362).

It would appear that there are now approximately 120,000 acres in the project, all of which must bear their portion of the construction charge. Of this amount there are approximately 51,000 acres in the Yuma Valley (tract C); 16,000 in what is designated as the Bard unit, which is on the California side and apparently once a part of the Indian reservation; and about 53,000 acres in what is designated as the Yuma Mesa, which apparently was not included in the project at its inception (449).[3] Of these areas the Bard unit was irrigated first, and

[2] The 14th annual report of the reclamation service (1915), however, makes clear the approximate total acreage in tracts A and B. It is there stated (p. 59) that the lands in the Gila Valley (tracts A and B) comprise 18,000 acres, 8,000 acres of which are on the north side (tract A) of that river.

[3] The 14th annual report (1915) of the reclamation service states (p. 59) that there are approximately 128,000 acres in the projects, apportioned among the *four* units there mentioned. In the 16th annual report (1916–1917) the irrigable area of the project is given at 110,000 acres (p. 63), apportioned among the *three* units there mentioned. It will be noted that one of the units (Gila Valley) is eliminated from the last-mentioned report.

charges have already been assessed against those lands (456, 507). With respect to the lands in the Yuma Valley (tract C), the number of acres furnished with water was gradually increased from 1912 to 1917, until in the latter year the project was able to deliver water to 52,000 acres, although only 27,800 were then being irrigated (458–9). After eliminating sand hills, sloughs, rights of way, canals, and drains the net irrigable acreage in tract C is about 50,500 (545). There never was an accurate determination of the irrigable area in the Lower Colorado Irrigation District at the time the project had its inception, the estimates at that time being merely tentative (385–6).

In determining the construction charges all of the three tracts above mentioned were taken into consideration, notwithstanding the fact that with respect to the lands in the Yuma Mesa it is doubtful if they will ever be irrigated (445). But not only are the lands in the Yuma Mesa charged with their share of the construction cost, but the project has been credited with $1,600,000 on account of a contract entered into with the Imperial Valley Irrigation District in California, under the terms of which that district must pay to the reclamation service the amount just mentioned, if it should decide to take water from the Laguna dam for the irrigation of lands in the Imperial Valley in California (445-9).

Whether this irrigation district will ever avail itself of the privilege just mentioned is, of course,

problematical, but the Secretary of the Interior acted upon the assumption that the money was actually in his hands, and therefore gave the project credit for this amount in determining the charges to be assessed against the land, within the project (451–2). The farmers endeavored to get the Secretary of the Interior to give them a double credit for this $1,600,000 on the $75 per acre charge, but were told that this could not be done without Congress giving its sanction (452–4).

THE ARRANGEMENTS MADE TO SUPPLY THE FARMERS WITH WATER PENDING THE COMPLETION OF THE PROJECT.

As already stated, the syphon at Yuma was completed in 1912, but prior to that time the government had purchased existing canals that were no longer in operating condition, and served the lands from these canals. After the completion of the Yuma syphon across the Colorado River, water was delivered by gravity at less than cost. It was a considerable time after the completion of this syphon before the government was ready to deliver water to all of the lands in tract C (430–1; 456). The two small canals which the government bought irrigated somewhere between 1,000 and 2,000 acres, and the owners of the remaining 49,000 acres were clamoring for water all the time (457). After the syphon was constructed in 1912 the government was able to deliver in that year water enough for from 7,000 to 20,000 acres, the amount increasing from year to

year until in 1917 there was enough to irrigate 52,000 acres (458–9). A few people in tract A were also furnished water for many years at less than cost (437).

THE PUBLIC NOTICE OF APRIL 6, 1917, WHICH IMPOSED A CONSTRUCTION CHARGE OF $75 PER ACRE.

There is no testimony in the record as to the actual cost of the project, although there is enough to indicate that its cost was in excess of the $3,000,000 set aside by the Secretary in 1904 (438–9).[4] The cost as finally determined by the notice of April 6, 1917, is a combination of the actual and the estimated cost, the former comprising the cost of the work already done, and the latter the estimated cost of what will be necessary from time to time in putting in drainage works. But a portion of the cost is charged to the lands on the California side and a portion to the lands in the Yuma Mesa (445).

The public notice of April 6, 1917, will be found at pp. 469–474, a construction charge of $75 per acre being imposed. Certain lands are described in this notice (470), and later a supplementary notice was issued, the date of which does not appear. But it was admitted on the trial that the original and the supplementary notices include all of the lands in tract C (474–5).

[4] As already stated, however, the 16th annual report (p. 68) shows that up to June 30, 1917, $8,387,641.24 had been expended.

THE COURT DID NOT PERMIT THE DEFENDANTS TO INTRODUCE TESTIMONY AS TO WHAT WAS SAID BY THE RECLAMATION OFFICIALS AT THE MEETING OF MAY 28, 1904, ON THE GROUND THAT THE EVIDENCE INTRODUCED BY THE PLAINTIFF WAS IMMATERIAL AND NEEDED NO CONTRADICTION.

See pp. 476–8.

**The main divisions in our brief.**

Our brief will be divided into three main divisions:

1. Matters relating to the interpretation of the Reclamation Act and to the contract of May 31, 1906.

2. Matters relating to the proposed amendments to the bill of complaint and the admission of testimony.

3. Matters relating to the completion of the project.

## ARGUMENT.

### Matters relating to the interpretation of the Reclamation Act and to the contract of May 31, 1906.

THIS COURT HAS HELD THAT THE UNDERLYING PURPOSE OF THE RECLAMATION ACT IS TO REQUIRE THE LANDS TO PAY BACK TO THE RECLAMATION FUND THE COST OF THE PROJECT, THUS INSURING THE FUND AGAINST DEPLETION; AND THAT THIS PURPOSE WILL BE DEFEATED IF THE COST OF MAINTENANCE IN ADDITION TO THAT OF CONSTRUCTION IS NOT INCLUDED. THE SAME REASONING IS APPLICABLE HERE.

*Swigart* v. *Baker*, 229 U. S. 187.

SECTION 4 OF THE RECLAMATION ACT SPECIFICALLY RECOGNIZES THAT THE PUBLIC NOTICE THEREIN MENTIONED IS NOT TO BE ISSUED PRIOR TO THE TIME CONTRACTS FOR CONSTRUCTION ARE LET. IGNORING ALL THIS, APPELLANTS CONTEND THAT THE SECRETARY OF THE INTERIOR ISSUED A PUBLIC NOTICE ON MAY 10, 1904, WHICH WAS LONG PRIOR TO THE DATE ANY CONTRACTS WERE LET.

The contract for the construction of the Laguna dam was let in June, 1905 (428, 488), to be com-

pleted within two years (435, 437). Work was begun in July, 1905 (379, 488). The levees along the Gila River were begun in 1905 or 1906 (486, 488). The levees along the Colorado River were built under contract (488–9). The record does not indicate when all of the various contracts were let, but the appellants at the trial recognized that the first one was let in 1905 (536). Moreover, the annual reports of the Reclamation Service make it clear that no contract was let prior to 1905. See 4th Annual Report, 97.[5] The Court of Appeals held in this case (634) that the Act contemplates that contracts shall be let before the public notice provided for in § 4 is given. A similar holding was made in *Payette-Boise, etc.*, v. *Cole*, 263 Fed. 734.

**IT IS APPARENT THAT THE SECRETARY OF THE INTERIOR DID NOT HAVE THE NECESSARY DATA BEFORE HIM IN 1904 TO DETERMINE THE CHARGE PER ACRE THAT SHOULD BE IMPOSED.**

All this is apparent from a reading of the testimony. In addition, see the following annual reports: 3rd (1904) 192; 4th (1905) 97; 5th (1906) 100; 6th (1907) 74.

It is of course important in this connection to bear in mind that § 4 of the Reclamation Act provides that "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably."

[5] See also the 15th annual report of the reclamation service, which gives under the heading "History of Construction and Engineering Features," a statement of the various contracts, etc. (p. 70).

**THE ANNUAL REPORTS OF THE RECLAMATION SERVICE TRANSMITTED TO CONGRESS SHOW WITH RESPECT TO EACH PROJECT UNDERTAKEN THE DATE THAT PUBLIC NOTICE IS GIVEN. IT IS SIGNIFICANT THAT THE FIRST TIME MENTION IS MADE OF A PUBLIC NOTICE IN CONNECTION WITH THE YUMA PROJECT IS IN THE 16TH ANNUAL REPORT FOR 1916-1917.**

The following is a list of the public notices appearing in these annual reports up to the year 1917, when mention is made for the first time of the public notice with respect to the Yuma project:

6th report (1907): Minidoka (86).

7th report (1908): Belle Fourche (180); Buford-Trenton (154); Carlsbad (143); Garden City (93); Huntley (103); Minidoka (82); North Platte (130); Shoshone (208); Sun River (117); Truckee-Carson (136); Umatilla (173); Williston (161).

8th report (1909): Belle Fourche (179); Carlsbad (135); Garden City (87); Huntley (98); Klamath (172); Lower Yellowstone (114); Minidoka (72); North Platte (121); Okanogan (189); Shoshone (212); Truckee-Carson (130); Umatilla (163); Williston (153); Yakima (198).

9th report (1910): Belle Fourche (262); Carlsbad (206); Klamath (250); Minidoka (127); North Platte (187); Okanogan (285); Truckee-Carson (198); Umatilla (239); Yakima (300); Yuma, lands in California (79).

10th report (1911): Belle Fourche (212); Buford-Trenton (187); Carlsbad (172); Lower Yellowstone (149); Minidoka (106); North Platte (159); Okanogan (225); Shoshone (246); Sun River (144); Sunnyside

(235); Tieton (235); Truckee-Carson (167); Umatilla (199); Williston (188).

11th report (1911–12): Belle Fourche (229); Buford-Trenton (224); Carlsbad (223); Huntley (212); Lower Yellowstone (214); Minidoka (205); Missouri River (224); North Platte (215); Okanogan (234); Shoshone (242); Sun River (212); Sunnyside (235); Tieton (237); Truckee-Carson (220); Umatilla (227); Williston (226); Yakima (235); Yuma, lands in California (204).

12th report (1913): Minidoka (98); North Dakota (186); North Platte (153); Okanogan (223); Shoshone (258); Sun River (139); Sunnyside (240); Tieton (241); Truckee-Carson (164); Umatilla (195); Yuma, lands in California (64).

13th report (1914): Huntley (151); Minidoka (119); Lower Yellowstone (178); Milk River (161); North Dakota (235); Klamath (255); North Platte (191); Okanogan (285); Sunnyside (304); Tieton (309).

14th report (1915): Belle Fourche (258); Carlsbad (204); Huntley (135); Klamath (251); Lower Yellowstone (166); Minidoka (104); North Platte (176); Okanogan (286); Shoshone (319); Sun River (158); Tieton (301); Truckee-Carson (189); Umatilla (240); Uncompahgre (83); Yuma, operation and maintenance charges (60).

15th report (1915–16): Carlsbad (315); Umatilla (362–368); Shoshone (502); Truckee-Carson (294-298); Klamath (381–2); Huntley (203–208); Yakima (476); North Platte (273–278); Orland (90); Belle Fourche

(397); Minidoka (168–182); Strawberry Valley (420); Sun River (242); Okanogan (442); Lower Yellowstone (252); Yuma, operation and maintenance charges (81).

16th report (1916–17): Salt River (53); Orland (74); Grand Valley (84); Minidoka (117); Huntley (134); Sun River (159); North Platte (177); Truckee-Carson (191); Carlsbad (203); Umatilla (239); Klamath (258); Belle Fourche (272); Strawberry Valley (288); Okanogan (308); Yakima (328); Shoshone (343); Yuma (65).

**THE VERY DOCUMENTS ON WHICH THE APPELLANTS RELY PLAINLY INDICATE ON THEIR FACE THAT NO FINAL DETERMINATION HAD BEEN MADE WITH RESPECT TO THE CHARGE PER ACRE TO BE IMPOSED.**

In this connection see the following: (1) Letter from Walcott, Director of the Geological Survey, to the Secretary of the Interior, dated May 9, 1904 (199); (2) The Secretary's reply of May 10, 1904, setting aside $3,000,000 for the project (200); (3) letter of May 16, 1904, from Newell, chief engineer, to the Yuma County Water Users' Association (215); in particular the paragraphs at pp. 216, 224, 225, 226.

Even the contract of May 31, 1906, shows upon its face that the Secretary of the Interior must *thereafter* determine certain matters before any public notice can be given.

This contract contains a recital (42) that under the articles of incorporation the shareholders are required to initiate water rights "as soon as such

rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed by the Secretary of the Interior."

The contract then goes on, in paragraph 1 (43), that "if the said Secretary of the Interior *shall* authorize and *shall* cause the construction of said irrigation works, then," etc. In paragraph 3 (44) it is provided that the aggregate amount of water rights to be used shall not exceed the number of acres capable of irrigation by the total available water; and "The Secretary of the Interior *shall* determine the number of acres so capable of such irrigation as aforesaid," etc. In paragraph 4 (44) it is provided that payments for water rights, under the provisions of the Act of Congress, shall be divided into not less than ten annual instalments, the first being payable at the time of the completion of the works, after due notice by the Secretary of the Interior to the association; and that the cost per acre shall be equal throughout the entire district proposed to be irrigated, without a single word being said as to what the cost shall be. It is provided in paragraph 5 (45) that the association is to guarantee "the payments for that part of the cost of the irrigation works, which *shall* be apportioned by the Secretary of the Interior to its shareholders," etc.

All these provisions unmistakably indicate that the charge per acre was not then determined.

**ALTHOUGH THE SECRETARY OF THE INTERIOR DID IN FACT DETERMINE IN 1904 THAT THE PROJECT WAS FEASIBLE, HE NEVER AT THAT TIME MADE ANY ESTIMATE OF THE COST AS A BASIS TO DETERMINE THE CHARGE PER ACRE, AND IN FACT HAD NOT DETERMINED BY MAY, 1904, WHICH OF THE VARIOUS ALTERNATIVE PLANS HE WOULD SELECT.**

This is indicated by Newell's letter of May 9, 1904, to the Secretary of the Interior, and by the latter's reply of May 10, 1904. Newell in his letter (199) says:

> There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending.

In his reply (201) the Secretary says:

> In compliance with your recommendation, I hereby set aside the sum of $3,000,000, or so much thereof as may be necessary, from the fund provided by the Act mentioned, for the construction of the Yuma project, *under the conditions you have set forth.*

**SECTION 4 OF THE RECLAMATION ACT ENUMERATES FIVE THINGS WHICH THE PUBLIC NOTICE MUST CONTAIN. THE ALLEGED PUBLIC NOTICE OF MAY 10, 1904, UPON WHICH APPELLANTS RELY, FALLS SHORT OF MEETING THESE REQUIREMENTS, THUS AGAIN DEMONSTRATING THAT IT WAS NOT THE NOTICE WHICH THE ACT CONTEMPLATES.**

The public notice must contain:

(1) The lands irrigable under the project.

(2) The limit of area per entry.

(3) The charge per acre imposed.

(4) The number of annual instalments.

(5) The time when payments shall commence.

It is needless to say that the letter of the Secretary of the Interior of May 10, 1904, printed at p. 199 and again at p. 226, does not measure up to these requirements. And the same is true of the pamphlet (Ex. 15; 209), which was distributed at Yuma on May 28, 1904. Moreover, Newell's letter of May 16, 1904, which was a part of the pamphlet, expressly says:

> The Secretary reserves the right to make such revisions in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare.

**THE APPELLANTS' MAIN WITNESS AND ONE OF THE ORGANIZERS OF THE ASSOCIATION ADMITTED THAT HE DID NOT REGARD THAT THE CHARGE PER ACRE WAS ACCURATELY DETERMINED AT THIS TIME.**

Bondesson testified—

> and even at the time of the issuance of what I have called the public notice I didn't regard the charge as fixed as an exact sum.

**THE SECRETARY OF THE INTERIOR MUST NECESSARILY BE INVESTED WITH A WIDE DISCRETION TO DETERMINE WHEN AN ESTIMATE OF THE COST IS TO BE MADE AS A BASIS FOR IMPOSING CHARGES. AND LIKEWISE MUST BE INVESTED WITH A WIDE DISCRETION TO DETERMINE WHEN THE PUBLIC NOTICE IS TO BE GIVEN. OTHERWISE THE VERY PURPOSE OF THE ACT OF CONGRESS TO MAINTAIN THE RECLAMATION FUND IN PERPETUITY MIGHT BE DEFEATED.**

If, as this court held in *Swigart* v. *Baker*, *supra*, the purpose of the Act is to maintain a revolving fund in perpetuity, it is apparent that the whole scheme can be thwarted by an immature attempt to estimate the cost and fix the per acre charge. The Act contemplates that funds may not be immediately available for the construction of the entire project. Accordingly it is provided (§ 4) that the Secretary "may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project." If, as the appellants contend, the Secretary *must* determine at the inception of the project what its cost will be, and *must* use this estimate as the basis for determining the charge per acre, it is apparent that inaccurate estimates of the cost, particularly with respect to projects that are to be constructed in successive sections only when the necessary money is available, will frustrate the very purpose of the law.

Moreover, the appellants' contention is one of complete antagonism to the reasoning of this court in the case just mentioned. If, as there held, "the estimated cost of construction of the project" is

broad enough to embrace maintenance charges, is the Secretary of the Interior powerless to impose such charges in future years because he fails in his estimate of cost to include a sum on this account?

**THE CONTRACT OF MAY 31, 1906, IS PLAIN AND UNAMBIGUOUS, AND REQUIRES THE WATER USERS' ASSOCIATION TO PAY THE COST.**

Paragraph 5 (45) reads:

> The said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the *cost* of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders.

**IT IS UNNECESSARY TO DETERMINE IN THIS CASE WHETHER THE ESTIMATED OR THE ACTUAL COST MUST CONTROL. IT IS SUFFICIENT TO HOLD THAT WHEN THE SECRETARY OF THE INTERIOR DETERMINES THE COST WITH A VIEW OF IMPOSING THE PER-ACRE CHARGE, HE IS AT LIBERTY TO USE WHATEVER ACCURATE INFORMATION HE THEN POSSESSES.**

The District Court held that § 4 of the Reclamation Act contemplates that the actual cost controls in fixing the per-acre charge.

"It is clear to my mind," said the district judge, "that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands, etc. (553).

The Court of Appeals used somewhat different language:

> By estimated cost is not meant the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project. The statute contemplates that contracts shall be let prior to the giving of the public notice, and the obvious reason for this is to give to the Secretary of the Interior an adequate knowledge upon which to make an estimate (634).[6]

As we view it, there is no disagreement between the two. The substance of the holdings of both courts is that when the Secretary of the Interior determines the "estimated cost" with a view to fixing the per acre charge, he is at liberty, *when* that determination is made, to take into consideration the facts as they *then* exist. If he *then* knows what the actual cost is, he is not required to shut his eyes to this accurate information and make an estimate as of 1904.

> *Cf.*, however, *Payette-Boise, etc.* v. *Cole*, 263 Fed. 734.

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[6] In this connection see the 15th annual report of the reclamation service, which gives (p. 70) a history of the various contracts under the heading "History of Construction and Engineering Features."

**THE ACT OF JUNE 25, 1910, 36 STAT. 835, APPROPRIATING $20,000,000 FOR THE RECLAMATION SERVICE UNDER THE CONDITIONS THEREIN MENTIONED, IS A LEGISLATIVE INTERPRETATION THAT THE ESTIMATES OF COST UNDER §3 OF THE RECLAMATION ACT TO ENABLE THE SECRETARY OF THE INTERIOR TO DETERMINE THE FEASIBILITY OF THE PROJECT ARE NOT THE ESTIMATES OF COST REQUIRED BY §4 OF THAT ACT UPON WHICH TO BASE THE PER ACRE CONSTRUCTION CHARGE.**

No one can read this Act without coming to the conclusion that Congress was disappointed and even alarmed at the great cost of some of the reclamation projects that had been undertaken. Evidently the cost had exceeded the estimates. The reclamation service had run out of funds. It was, therefore, necessary either to abandon all work or to provide new funds to enable projects already under way to be carried to completion. The latter alternative was selected. Accordingly, $20,000,000 were appropriated. But the Act, it will be noted, contains a specific provision that all advances are to be paid back in the manner therein provided. Obviously, this would be impossible *if* the preliminary estimates made under §3 *must* govern in determining the per acre charge. The intent of Congress to make the various reclamation projects self-sustaining, manifested at the time that the Reclamation Act of June 17, 1902, was passed, would necessarily be defeated. This circumstance therefore affords additional proof of the fact that Congress never intended that the Secretary of the Interior *must* use the preliminary estimates in determining the per acre construction charge.

As to the right to resort to legislative interpretation, see *Swigart* v. *Baker*, 229 U. S. 187.

## MATTERS RELATING TO THE AMENDMENT OF THE BILL OF COMPLAINT AND THE ADMISSION OF TESTIMONY.

### THE CONTENTION THAT THE TRIAL COURT WAS WRONG IN REFUSING TO GRANT THE APPELLANTS LEAVE TO FILE A SUPPLEMENTAL PLEADING, ALLEGING THAT THE SECRETARY OF THE INTERIOR AGREED TO GIVE THE LANDOWNERS AN ADDITIONAL CREDIT OF $1,600,000 ON THE $75 PER ACRE CHARGE, ON ACCOUNT OF HIS CONTRACT WITH THE IMPERIAL VALLEY IRRIGATION DISTRICT WHEREBY THAT DISTRICT WAS ALLOWED TO CONNECT WITH THE LAGUNA DAM ON PAYMENT OF THIS AMOUNT, IS WHOLLY DEVOID OF MERIT.

The evidence is uncontradicted that when the Secretary of the Interior, on April 6, 1917, imposed a charge of $75 per acre he gave the project credit for $1,600,000 on account of his contract with the Imperial Valley Irrigation District, although the money was not then in his hands and, of course, never would be, if that district should elect not to avail itself of the option given under the contract to connect with the Laguna dam. The Secretary was, however, apparently so confident that the money would eventually be paid that he felt justified in assuming that the money was already in his hands. Accordingly in determining the cost of the project he gave credit for the $1,600,000. This is beyond dispute (446–9, 452).

It seems, however, that the farmers were not satisfied with this and wanted the Secretary to give them a *double* credit; that is to say, to again give them credit on the $75 per acre charge if the Imperial Valley Irrigation District should thereafter exercise its option to connect with the Laguna dam and

actually pay the $1,600,000 for this privilege (452–4). In rebuttal the appellants introduced testimony that the Secretary made a promise to this effect, and that he said at the time that he would reduce his promise to writing, but before he got around to it he left Washington on a Liberty loan drive, and that was the end of the matter (537–40). It would seem that what the Secretary really said was that he would endeavor to do this if the farmers on their part would get legislation from Congress authorizing him to do so (541). He took the position that he had no authority to agree with the farmers to give them the credit they were asking for, and told them that it would be necessary for them to go before Congress (453).

In the light of all this the appellants, at the conclusion of the trial, asked leave to file a supplemental pleading setting forth that the Secretary had made such a promise (542). The pleading that was tendered will be found at pp. 138–140. The court denied the request on two grounds (543), either one of which is sufficient to support the ruling.

We think nothing more need be said, particularly so in view of the statement at p. 75 of the appellants' brief: "The whole matter is so peculiar and unprecedented that we believe it would be hopeless to even attempt to search for authorities in point."

THERE IS NO MERIT IN THE CONTENTION THAT THE TRIAL COURT WAS WRONG IN REFUSING TO ALLOW THE PLAINTIFFS TO INTRODUCE EVIDENCE IN SUPPORT OF THEIR AMENDMENT TO THE BILL WITH RESPECT TO HOMESTEADERS WHOSE ENTRIES WERE REQUIRED TO BE REDUCED TO THE 40-ACRE FARM LIMIT.

The day the case came on for trial the appellants filed an amendment to their bill by adding a new paragraph to the effect that on May 10, 1904, many thousands of acres in tract C were held in private ownership under homestead and desert-land entries; that on that date the entrymen were members of the water users' association; that Theobald had, on May 5, 1901, entered 160 acres; that on July 12, 1902, the Secretary withdrew the same under the provisions of the Reclamation Act; that owing to the noncompletion of the project Theobald was unable to make cultivation and improvements, and accordingly was obliged, in 1908, to relinquish his entry in favor of Hevener, who made a new homestead entry, paid the fees, received a certificate, offered final proof in 1915, and thereupon received a certificate showing residence and cultivation; and that he is now required, as a condition of receiving water, to reduce his farm unit to 40 acres. This, it is alleged, is a typical case (58–60). The matters alleged were put in issue by stipulation (134).

At the trial plaintiff made an offer of proof (372). The court later made a formal ruling (504) to the effect that the matters alleged were immaterial and accordingly no testimony could be introduced.

The offer of proof fell far short of an offer to prove *all* the matters alleged, and the contention now ad-

vanced by appellants might therefore properly be disposed of on this ground alone. But even if we disregard this defect, the appellants' contention is without merit. Section 3 of the Reclamation Act authorizes the Secretary—

> at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible for irrigation from said works: Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act.

Section 4, it will be recalled, provides, among other things, that the public notice therein mentioned shall contain the "limit of area per entry." The appellants expressly admit in their brief (p. 143) that the Secretary of the Interior did not, even in 1904, issue any public notice under §4 designating the limit of area per unit. On the contrary they frankly say, at p. 79 of their brief: "But so far as is disclosed in this case the Secretary does not seem to have given any public notice of the limit of area per entry within the Yuma Project until April 6, 1917." Moreover, the appellants openly acknowledge the weakness of their position. "It may be," they say in their brief, "that in law those facts, even if admitted, would not entitle that particular class of

landowners to the relief prayed for as to them" (p. 63). Again, at p. 80, "We appreciate the fact that a great deal can be said in support of the contention that the Secretary has even now a right to limit the area of those entries."

But in the face of all these deliberate admissions, it is said at another place in the brief (p. 81) that the Secretary, at some time prior to December 5, 1910, issued a public notice fixing the unit at 80 acres with respect to public lands and 160 acres with respect to private lands; and reference is made to the 9th annual report of the Reclamation Service, p. 73, in support of this statement. This reference, however, shows on its face that the units there mentioned pertain to lands in California, not in Arizona, as the appellants would have this court believe.

**THERE IS NO MERIT IN THE CONTENTION THAT THE COURT IMPROPERLY ADMITTED TESTIMONY ON CROSS-EXAMINATION WITH RESPECT TO LAND VALUES AND MADE FINDINGS OF FACT WITH RESPECT TO THE SAME, WHILE DENYING TO APPELLANTS THE OPPORTUNITY OF INTRODUCING TESTIMONY ALONG THE SAME LINES.**

The bill alleges that the lands could not afford to pay $75 per acre and that this is out of all proportion to the value of the project (25). The trial court, on the cross-examination of a witness, admitted the testimony complained of for a limited purpose (294). But complaint is made that the trial judge, after refusing (504) to allow the plaintiffs to introduce testimony in accordance with an offer of proof (371), nevertheless based his decision, in part

at least, on testimony which the offer of proof was designed to attack. What the trial judge, in his opinion, said was this (561):

> Incidentally, it may be said that while the cost of construction was much greater than was anticipated, the lands have been greatly benefited and the testimony shows that the annual net revenue per acre is almost equivalent to the cost per acre of the project.

Evidence was introduced without objection, entirely aside from that elicited on the cross-examination complained of, upon which the court could make such a finding. Davis, on cross-examination by appellants, gave testimony of a similar nature. He said that when some of the lands were thrown open to entry after the public notice of 1917 had been issued, the average number of persons trying to acquire the respective tracts was about 50. In one instance 126 persons filed applications for the same tract. "That illustrates," he went on to say, "the fact that the lands are in much demand. They have increased the value of the land, increased the value of the farmers' products, increased the number of people in the valley; and all this in spite of an announcement of the $75 charge. It is the most prosperous and most highly productive per acre project in the reclamation service. So far as I know, I do not know of any private development that large that is as promising and is as prosperous as the Yuma Valley" (461–2).

Furthermore, the various annual reports of the reclamation service, which both parties admitted at the trial the court could take judicial notice of (203–208), contain data affording ample basis for the statement in the trial judge's opinion.

But the important part of the whole matter is that the trial judge's decision was in no way influenced by the matters alluded to. He repeatedly stated his position throughout the trial, and the finding complained of was but a mere incidental statement in no way forming the basis of his decision.

**Matters relating to the completion of the project.**

**THE PROJECT IS COMPLETED. BOTH OF THE LOWER COURTS SO HELD, AND THE CASE THEREFORE FALLS WITHIN THE FAMILIAR RULE THAT THIS COURT WILL NOT DISTURB THE CONCURRENT FINDINGS OF THE TWO LOWER COURTS UNLESS PALPABLY ERRONEOUS.**

The evidence as to the completion of the project is referred to in our statement of the facts, and need not be repeated here. One statement of the appellants must not, however, remain unchallenged. They say that out of 22 miles of drains to be constructed only 3 have been built. The 1904 map, however, shows that only 14 miles were contemplated, and, according to the testimony, 13 have been built (436). No testimony was introduced that any of the plaintiffs was suffering on account of lack of drainage. Moreover, it is significant that the expert witness whom the plaintiffs put upon the stand to testify that the project was not completed, did not once refer to any lack of drainage as a basis for his opinion.

On the contrary, the sole thing he complained of was that levees had not been built to control the Colorado and Gila rivers. After going into this feature, he concluded with the statement, "I think that outlines my reason for stating that in my judgment the project is not completed" (512).

The case falls within the well-established rule that this court will not disturb the concurrent findings of the two lower courts unless palpably erroneous.

*Brewer-Elliott, etc.* v. *United States,* Adv. Op., November 13, 1922.
*Bodkin* v. *Edwards,* 255 U. S. 221.

**THE APPELLANTS' CONTENTION THAT THE PROJECT IS NOT COMPLETED BECAUSE TRACTS A AND B HAVE BEEN ELIMINATED OVERLOOKS THE FACT THAT THE SECRETARY OF THE INTERIOR DECIDED THAT IT WAS NOT PRACTICABLE TO INCLUDE THEM; AND, MOREOVER, DISREGARDS BOTH THE PROVISION IN THE PAMPHLET (EX. 15) WHICH RESERVED TO THE SECRETARY THE RIGHT TO MAKE SUCH REVISIONS IN THE PLANS AS THE PUBLIC INTERESTS MIGHT DICTATE, AS WELL AS THE PROVISION IN THE CONTRACT OF MAY 31, 1906, WHICH GAVE TO THE SECRETARY THE RIGHT TO DETERMINE THE NUMBER OF ACRES SUSCEPTIBLE OF IRRIGATION.**

The appellants' contention that because tracts A, B, and C were included in the Lower California Irrigation District, therefore *all* of the lands must be reclaimed before it can be said that the project is completed, entirely ignores the essential facts mentioned in the heading. Carried to its ultimate conclusion, it would mean that *every* acre in that district, no matter how impracticable, must be reclaimed. Obviously, this could not have been the intention of the parties. The Secretary, in explicit

terms, reserved the right to make such change in the plans as the public interests might dictate. His finding, supported as it is by substantial testimony, is not subject to review.

*Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407.

*Cf. Kihlberg* v. *United States*, 97 U. S. 398.

**EVEN IF IT COULD BE SAID THAT THE SECRETARY OF THE INTERIOR WAS IN POINT OF LAW NOT AUTHORIZED TO ELIMINATE TRACTS A AND B, NEVERTHELESS HIS EXCLUSION OF THESE TRACTS WOULD NOT CONSTITUTE A MATERIAL BREACH OF THE CONTRACT WHICH WOULD ENTITLE THE APPELLANTS TO THE RELIEF THEY CLAIM.**

There is no testimony that any of the landowners in tract C will be damaged by the exclusion of tracts A and B. The only benefit that they could possibly derive from having these tracts remain in the project would be to reduce the per acre construction charge. But although these tracts have been excluded, the lands in the Yuma Mesa have taken their place. There are approximately 18,000 acres in tracts A and B. The lands in the Yuma Mesa, which were not included when the project had its inception, comprise something like 53,000 acres, all of which are to stand their share of the cost. (See our statement of facts under the heading "Even after eliminating tracts A and B, the area of the lands included in the project upon which the charges of construction are assessed is greater than that originally contemplated.") Obviously, therefore, it can not be said, from any point of view, that there has been a *material* breach of the contract.

IF THE POSITION OF THE APPELLANTS IS CORRECT, TO THE EFFECT THAT TRACTS A AND B MUST BE BROUGHT INTO THE PROJECT BEFORE IT CAN BE SAID THAT THE WORKS ARE COMPLETED WITHIN THE MEANING OF THE CONTRACT OF MAY 31, 1906, THE NECESSARY RESULT WILL BE TO POSTPONE FOR ALL TIME TO COME THE COMPLETION OF THE PROJECT, OR ELSE THE SECRETARY OF THE INTERIOR MUST RESTORE THE COLORADO AND GILA RIVERS TO THE POSITIONS THEY OCCUPIED IN 1904.

It will be recalled in this connection that the Colorado River has materially changed its course, at places probably a mile or even more (523). And it will also be recalled that it was finally determined that a safe crossing for the canal could not be made over the Gila River because of the destructive action of that river (430), for which reason it was found necessary to build the canal along the California side and carry the water across the Colorado River to Arizona by means of a syphon, which was constructed just below Yuma (381).

The decree, it is respectfully submitted, should be affirmed.

JAMES M. BECK,
*Solicitor General.*
WILLIAM D. RITER,
*Assistant Attorney General.*

JANUARY, 1923.

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# YUMA COUNTY WATER USERS' ASSOCIATION ET AL. *v.* SCHLECHT ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 268. Argued February 28, 1923.—Decided April 30, 1923.

1. Preliminary, tentative opinions of the cost of constructing projected irrigation works, expressed by government engineers and officials in official correspondence and in statements at a meeting of prospective water-users, do not constitute the estimate of cost, or the public notice, required by § 4 of the Reclamation Act, and, though relied upon by the water-users in subjecting their lands to the project, do not bind or estop the Government from afterwards fixing the construction charges against the lands pursuant to the statute, in accordance with a higher estimate arrived at in the light of further investigation and experience. P. 143.
2. The Reclamation Act, § 4, contemplates a precise and formal public notice, stating the lands irrigable under a project, the limit of area for each entry, the charges per acre, the number of annual instalments, and the time when payments shall commence. P. 144.
3. The determination by the Secretary of the Interior of the practicability of a project and the making of the construction contracts are conditions precedent to the estimate of cost and the public notice, under § 4 of the act. P. 145.
4. The time within which the notice shall be given, after the occurrence of these conditions, is left to the sound discretion of the Secretary; and he may delay the notice while the question of cost remains in doubt. P. 145.

5. A contract between the Government and a water-users' association provided for payment of the first instalment of charges at the time of completion of proposed works, and reserved the right of the Secretary of the Interior to make such changes of the plans "as further investigations and circumstances" might "dictate to be requisite for the public welfare". *Held*, that the works were not to be deemed incomplete either (a) because a small part of the drainage system was unfinished, the effectiveness of the system not being thereby detracted from, or (b) because two of three tracts which the Government undertook to reclaim were eliminated by the Secretary, in the exercise of his discretion, greater areas having been substituted which more than counterbalanced any injury that otherwise might have resulted to complaining water-users in the matter of increased assessments. P. 146.
6. Concurrent findings of fact of the District Court and the Circuit Court of Appeals, sustaining a determination of the Secretary of the Interior that reclamation works had been completed when public notice was given under § 4 of the Reclamation Act, must be accepted by this Court, in absence of clear error. P. 146.

275 Fed. 885, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court, which dismissed, upon the merits, a suit to restrain officials of the Reclamation Service from taking steps toward the enforcement of charges for construction cost, under the Reclamation Act.

*Mr. Thomas D. Molloy* for appellants.

*Mr. Assistant Attorney General Riter*, with whom *Mr. Solicitor General Beck* was on the brief, for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Yuma County Water Users' Association is a corporation organized primarily to represent the settlers on the Yuma Irrigation Project in Arizona in their dealings with the Government. The other appellants are shareholders and owners of tracts of land under the project.

On April 8, 1904, the Secretary of the Interior received the report of a board of consulting engineers, made at his request, giving alternative estimates of the cost of the project, and recommending that $3,000,000 be set aside for construction. This report was followed by a letter from the Director of the Geological Survey, joining in the recommendation and, among other things, saying:

"In general the reports indicate that by means of construction of a dam across Colorado River and other works, it will be possible to reclaim upwards of 85,000 acres of land at a cost of less than $40 per acre. . . .

"The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is believed that the cost of $40 per acre is not prohibitive.

"There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending."

The Secretary, on May 10, 1904, replied approving the recommendation. Correspondence ensued between the Water Users' Association and the officials of the Reclamation Service, and on May 28, 1904, a meeting between them was had. It does not seem necessary to give the details of this correspondence or of the meeting. It suffices to say that, throughout, the officials declared that in their opinion the project would cost at the rate of about $35 per acre, and the water users joined in the enterprise under that belief. True, it was stated that this sum might be increased or lessened as the work progressed and the opinion was otherwise qualified; but it was evidently thought that the cost would not depart

from the figures given to any great extent one way or the other. Thereupon the land owners subscribed for shares in the association, binding themselves to pay the cost of the project in proportion to their interests and pledging their lands as security to that end.

On May 31, 1906, the association, acting for its shareholders, entered into an agreement with the Government by which it was stipulated: that the Secretary should determine the number of acres capable of irrigation under the project; that payments should be divided into not less than ten equal annual installments, the first payable at the time of the completion of the works, or within a reasonable time thereafter and after due notice from the Secretary; and that the cost per acre should be equal throughout the district. And the association agrees "that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the cost of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders. . . ." The contract is silent as to the amount of the cost and nowhere suggests that it had already been fixed.

It does not appear that a definite plan of construction was determined upon until after the meeting in 1904; the report of the engineers contains no estimate in respect of the works as they were finally constructed; and no construction contract was made until June, 1905. In the process of construction, great and unexpected difficulties were encountered. The contractors finding themselves unable to proceed, abandoned their contract and the Government was forced to take upon itself the burden of completing the work. The ultimate cost was more than double what had been anticipated. The project was finally completed, as found by both lower courts, on April 6, 1917, and on that date public notice was given

by the Secretary, imposing upon the water users a construction charge of $75 per acre. This notice complies with the provisions of § 4 of the Reclamation Act, 32 Stat. 388, 389, c. 1093, printed in the margin.[1]

Appellants (plaintiffs) brought suit in the United States District Court for the District of Arizona to enjoin the defendants, who were officials of the Reclamation Service, from putting into operation the determination of the Secretary so as to exact a greater sum than $35.28 per acre. The court, after a trial, found in favor of the Government and dismissed the bill and its action was affirmed by the Court of Appeals (275 Fed. 885), from whose decree the case comes here by appeal.

The pleadings are voluminous, much testimony was taken at the trial and a large number of errors have been assigned. After eliminating from consideration those matters which are clearly immaterial or without merit, two questions remain. They are:

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[1] "Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

(1) Whether the report, correspondence and statements made in 1904 constituted an estimate of the cost of the project and a public notice, under the terms of § 4; and, if not, whether the notice of 1917 may be so regarded?

(2) Whether the project was completed on April 6, 1917, within the meaning of the contract of 1906?

First. It is contended by appellants that the report of the engineers, the correspondence among the officials and with the Water Users' Association and the statements made at the meeting in 1904, taken together, constitute an estimate of cost binding on the Government, and, though informal, a compliance with § 4 as to public notice. That it was the firm belief of the government officials that the cost of the project would not greatly, if at all, exceed $35 an acre, and that their opinion to that effect was given to the Water Users' Association, by the documents and statements referred to, does not admit of doubt. It seems clear that the water users relied upon these expressions of opinion, and it may be assumed that if they had known in the beginning that the cost was to be as much as $75 per acre they would not have gone forward with the enterprise. But however confidently these opinions were expressed and however much they may have influenced the water users, the attendant circumstances, the language employed and the statutory requirements all preclude the idea that they constituted an estimate of the cost as contemplated by the statute. No element of fraud or bad faith is shown or suggested. The Reclamation Act sets aside all money received from the sale and disposal of public lands in certain States and Territories named for the reclamation of the arid lands therein; and this fund is to be kept intact as nearly as possible by collecting from the water users under each project the estimated cost of the construction thereof. See *Swigart* v. *Baker*, 229 U. S. 187, 197. The extent to which the fund will be preserved, obviously, will depend

upon the accuracy of the estimate, and this in turn, will depend upon the care exercised in securing information upon which to base it. Investigation as to the feasibility of any project, opinions of experts and collection of data relating to the question of cost must precede such an estimate, and § 4, moreover, requires that the charges against water users shall not be assessed until after construction contracts shall have been made, the evident purpose being to put the Secretary in possession of the data furnished by the contracts themselves before he acts in that respect. Prior to the making of the construction contracts, opinions expressed by engineers or officials may be estimates in one sense, but they are tentative and preliminary and cannot be regarded as constituting the required statutory estimate, though contributing to the basic facts upon which it is made. See *Payette-Boise Water Users' Ass'n.* v. *Cole*, 263 Fed. 734, 738–739. The statute contemplates a precise and formal public notice which must state the lands irrigable under the project, the limit of area for each entry, the charges to be made per acre, the number of annual installments and the time when the payments shall commence. The opinions, correspondence and statements relied upon do not fulfill the statutory requirements and we must hold that the Government is neither bound nor estopped by them. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–409; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291; *Whiteside* v. *United States*, 93 U. S. 247, 256–257; *The Floyd Acceptances*, 7 Wall. 666, 676; *Filor* v. *United States*, 9 Wall. 45, 49; *Hart* v. *United States*, 95 U. S. 316; *Lee* v. *Munro*, 7 Cranch, 366. Moreover, the contract of 1906, made subsequently, expressly provides for payment on the part of the water users "for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders." Plainly this looked forward to

future action on his part and did not rest upon any action already taken.

Following the provisions requiring the Secretary to determine the practicability of the project and to make construction contracts the words are "and thereupon he shall give public notice," etc. The word "thereupon" is construed by appellants as an adverb of time, meaning immediately thereafter. But this is only one of its uses. It is employed more frequently to express the relation of cause or of condition precedent. It is in the latter sense that it is used here, and its meaning is that the determination as to the practicability of the project and the making of contracts are precedent conditions to the estimate of cost and public notice. See *Porphyry Paving Co.* v. *Ancker*, 104 Cal. 340, 342. The notice must follow the coming into existence of the conditions. The time thereafter within which it shall be given is left, and from the nature of the matter must be left, to the discretion of the Secretary, and whether that discretion has been unreasonably exercised will depend upon the circumstances of each case. Here it is made plain that performance of the construction contract became impossible and the same was abandoned. Acting upon its judgment, which so far as the record shows was not unreasonable, the Government then itself undertook the completion of the work. Physical conditions not originally foreseen were encountered, presenting difficulties and requiring increased expenditures of great magnitude. It does not appear that these expenditures were made unnecessarily or improvidently; nor is there anything in the record to indicate that the work was not done with reasonable expedition. The uncertainties arising from the newly discovered conditions, the abandonment of the construction work by the contractors, the changes which were necessitated in the original plans, and the unexpected turn of events in other respects, left the question of cost in such doubt as to justify withholding

the public notice until it could rest on more definite information. The delay, it is true, was long continued but, under all the circumstances, we cannot say as a matter of law, that it was undue or that the Secretary's discretion in respect of the time was unreasonably exercised.

Second. The contract of May 31, 1906, provides that the first installment shall be payable at the time of the completion of the proposed works, and appellants contend that in two respects they were not completed on April 6, 1917, when the public notice was given: (1) that complete drainage for one of the tracts was not provided, and (2) that only one of three tracts which the Government promised to reclaim was reclaimed.

As to the first point, it is sufficient to say that the testimony shows that the contemplated drainage was substantially completed, and fails to show that the small portion left undone detracted in any way from the effectiveness of the system.

As to the second point, the original plans disclose that it was the intention to reclaim the three tracts mentioned, but the Secretary reserved the right to make such changes "as further investigations and circumstances may dictate to be requisite for the public welfare." The elimination, therefore, of the two tracts was within his discretion. Moreover, while these tracts were not reclaimed, other lands of greater area were added to the project which much more than counterbalanced any injury to the water users here concerned that might otherwise have resulted from the omission. The Secretary determined that the project had been completed when the public notice was given and both lower courts concurred in the same finding. These findings will be accepted here in the absence of clear error, which the record before us does not show. *Bodkin* v. *Edwards*, 255 U. S. 221; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77.

The decree of the Court of Appeals is

*Affirmed.*